Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

NIGHT VISION CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

STEPHEN NOVACK
Counsel of Record
P. ANDREW FLEMING
JOHN F. SHONKWILER
NOVACK AND MACEY LLP
100 North Riverside Plaza
Chicago, Illinois 60606
(312) 419-6900

Attorneys for Petitioner

Midwest Law Printing Company/Photex — Chicago — (312) 431-0185

QUESTIONS PRESENTED

1. Once a government agency decides to pursue technology developed by a small business (the "SBIR Developer") under the Small Business Innovative Research program ("SBIR"), does Section 638(j)(2)(C) of the Small Business Innovation Development Act require the agency to award the contract to the SBIR Developer whenever practicable, or does that Section, as the Federal Circuit held, leave such agencies with the same unbridled discretion that they had prior to the enactment thereof—*i.e.*, the discretion to award the contract to a different (and larger) business?

2. After acknowledging that United States Contracting Officers have statutory authority to "enter into, administer, and/or terminate contracts and make related determinations and findings," did the Federal Circuit err in holding that, as a matter of law, they lack authority to enter into otherwise valid oral or implied-in-fact contracts to grant Phase III awards to SBIR Developers?

RULE 29.6 DISCLOSURE

Petitioner Night Vision Corporation is an Illinois Corporation. NVC has no parent company. No entity owns stock in NVC.

TABLE OF CONTENTS

PAGE

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

A. SBIR's Purpose 4

B. Section 638—The SBIR "Phase III" Incentive ... 5

C. Night Vision Goggles 6

D. NVC's Revolutionary "PNVG" Goggle 7

E. SBIR Phase I 8

F. SBIR Phase II 8

G. Insight 9

H. The Government's Phase III Promises 9

I. Insight Procedures Phase III Funding, And Gains Influence 10

J. Insight Moves In 11

K. Completion Of Phase II 12

L. The Air Force Admits That It Promised Phase III to NVC 12

M. "Open Competition" 13

N. Still Not Safe 13

O. This Litigation 14

REASONS FOR GRANTING THE WRIT 15

I. Summary of Reasons for Granting The Writ .. 15

A. First Issue—The Federal Circuit's Erroneous Construction Of Section 638 15

B. Second Issue—The Federal Circuit's Erroneous Ruling Regarding Contracting Authority 17

II. The Reasons For Granting The Writ As To The First Issue—The Federal Circuit's Erroneous Construction Of Section 638 18

A. Important Ruling 18

1. Issue of First Impression 18

2. Broad Implications 18

3. Exclusive Jurisdiction 19

4. Policy Implications 19

B. Wrong Ruling 20

1. The SBIR Laws Are Obligatory 20

a. Plain Text of Section 638 20

b. SBA Interpretation 22

c. SBIR Policy 23

2. Federal Circuit's Flawed Reasoning 23

a. The SBIR Laws Are Not "Housekeeping" Provisions 23

b. The SBIR Laws Are Not Discretionary 24

III. The Reasons For Granting The Writ As To The Second Issue—The Federal Circuit's Error Regarding Contracting Authority 26

A. Important Ruling 26

1. Universal Application 26

2. Exclusive Jurisdiction 27

B. Wrong Ruling 27

CONCLUSION 30

TABLE OF AUTHORITIES

Cases **PAGE(S)**

American Fed'n of Gov't Employees v. Fed'l Labor Relations Auth., 715 F.2d 627 (D.C. Cir. 1983) 25

Arakaki v. U.S., 62 Fed. Cl. 244 (2004) 29

AT&T v. U.S., 307 F.3d 1374 (Fed. Cir. 2002) 24

Brunner v. U.S., No. 98-554C, 2006 WL 1189492 (Ct. Cl. May 2, 2006) 29, 30

Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837 (1984) 22

Chris Berg, Inc. v. U.S., 426 F.2d 3134 (Ct. Cl. 1970) 24

H. Landau & Co. v. U.S., 886 F.2d 322 (Fed. Cir. 1989) 29

Horner v. Hollander, 895 F.2d 759 (Fed. Cir. 1990) 21

LDG Timber Enterp., Inc. v. Glickman, 114 F.3d 1140 (Fed. Cir. 1997) 28

OTI America, Inc. v. U.S., 68 Fed. Cl. 108 (2005) 19

Schism v. U.S.,
316 F.3d 1259 (Fed. Cir. 2002) 24

SMS Data Prods. Group, Inc. v. U.S.,
853 F.2d 1547 (Fed. Cir. 1988) 25

TRW Inc. v. Andrews,
534 U.S. 19 (2001) 22

Statutes and Rules

28 U.S.C. §2101(c) 1

28 U.S.C. §1491 14

28 U.S.C. §1254(1) 1

15 U.S.C. §638(j)(2)(C) 1, 20-21

15 U.S.C. §638(a) 23

48 CFR 2.101 ..... 2, 28

48 CFR 52.227-11(b) 5

67 FR 60072 ..... 2, 6, 21, 22, 26

S. Ct. R. 13.1 1

Legislative History

S. Rep. 97-194, 182 U.S.C.C.A.N. 512 ..... 4, 5, 22, 23

Joint Statement of Managers From the
Committee on Small Business,
H.R. 2392 (October 5, 2000) 26

OPINIONS BELOW

The opinion of the Federal Circuit is reported at 2006 WL 3378419 and is reprinted in the Appendix at A2 - 13.[1] The opinion of the Court of Federal Claims is reported at 68 Fed. Cl. 368 (2005) and is reprinted in the Appendix at A14-78.

JURISDICTION

The final judgment of the Federal Circuit affirming the decision of the Court of Federal Claims was entered on November 22, 2006. This Petition for Writ of Certiorari is filed within ninety days from that date. 28 U.S.C. §2101(c); S. Ct. R. 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Small Business Innovation Development Act of 1982

15 U.S.C. §638(j)(2)(C) Modifications

> Not later than 90 days after October 28, 1992, the [SBA] Administrator shall modify the policy directives issued pursuant to this subsection to provide for—
>
> . . .
>
> (C) procedures to ensure to the extent practicable, that an agency which intends to pursue research, development, or production of technology developed by a small business concern under a SBIR program

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[1] Items in the attached Appendix are cited as "A__."

enters into follow-on, non-SBIR funding agreements with the small business concern for such research, development, or production.

SBIR Program Policy Directive, September 24, 2002

67 FR 60072, 60075-76

It is clear that Congress intends, to the greatest extent practicable, that agencies issue Phase III awards to the SBIR awardees that developed the technology.

(Other pertinent excerpts of the Policy Directive are contained in the Appendix at A79 - 81.)

Federal Acquisition Regulations

48 CFR 2.101

Contracting officer means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings.

STATEMENT OF THE CASE

How can it be that a statute that *orders* the Small Business Administration ("SBA") to *ensure* that procuring agencies under SBIR award follow-on contracts to small businesses whose technology is being developed or produced—"imposes no duty" on the procuring agencies? (*See* A10.) And how can it be that a small business that introduces revolutionary, life-saving technology to the Government under SBIR has *no remedy* when a procuring agency—in derogation of that statute—casts the small business aside to award the lucrative follow-on contracts to a large, politically connected "insider"? (*See id.* at 9.)

Although the questions sound rhetorical, they are the inescapable questions raised by the Federal Circuit's ruling below, which erroneously found that the statute Congress enacted to implement the SBIR program merely "deals with 'procedures' to accomplish the stated objective," but "*does not mandate particular action to achieve those results.*" (*Id.*; emphasis added.) In so ruling, the Federal Circuit blessed procurement tactics that—in addition to harming a small business—have deprived our Air Force pilots of night vision technology that the Government regarded as "revolutionary" and capable of providing a "giant leap" in "mission performance" and "survivability" for all pilots. Moreover, if allowed to stand, the Circuit's ruling would eliminate one of SBIR's principal protections for small businesses and seriously threaten the future of the program.

The Circuit's ruling is almost certain to be the final word from the U.S. Court of Appeals on the subject and, unless reversed, will continue to cause the very problems that Congress created the SBIR program to eliminate.

A. SBIR's Purpose

Contracts with the Government to develop and manufacture military equipment require substantial funding that must be appropriated by Congress. Government agencies compete over limited available funding to support their respective agenda. Programs that are not funded ultimately fail. These dynamics create a government contracting culture in which there is pressure to make contract awards to politically powerful companies whose lobbyists are able to secure funding.

Indeed, a perceived bias of government contracting officers in favor of large businesses was among the concerns that prompted Congress to create the SBIR program. *See* S. Rep. 97-194, 182 U.S.C.C.A.N. 512, 515. The Committee on Small Business heard the following testimony as to the need for the legislation:

> To many, the federal government is seen as one of the major contributors to the steady ossification of our once dynamic economy by discriminating against small enterprise. For example, the federal government procures over $30 billion in research and development annually, but less than 4 percent from small businesses. Of the over $15 billion procured from business, just 70 companies do 80 percent of this research, and only 4 account for nearly 20 percent. Most of these are huge firms. This disproportion is indeed astonishing, because the federal government itself, in study after study, has found that small firms are substantially more innovative per research dollar spent than are large firms. This is the factual support for the claim that the federal government is wasting vast amounts of taxes, while at the same time contributing to the erosion of our economic dynamism. *Id.*

SBIR was thus designed to give small businesses the means and incentives to bring their inventions to the

Government. However, it collides with a government contracting culture that has traditionally favored awards to larger, politically connected firms.

This case is about a small company that introduced an important and revolutionary military product to the Government through SBIR, only to be forced out as the Government began planning for production. It is a case in which the Government disregarded SBIR's letter and spirit in order to accommodate more compelling political pressures and old procurement habits. It also presents the judiciary with its critical first opportunity to interpret and apply 15 U.S.C. §638(j)(2)(C) ("Section 638" or "§638"), which contains one of the SBIR program's key protections and incentives for small business contractors.

B. Section 638—The SBIR "Phase III" Incentive

Without SBIR, the small business innovator had little incentive to work with the Government. That was because a small business could expend the substantial resources necessary to *conceive* and *develop* a valuable innovation for Government use, only to be given nothing at the end of the day but a thank you—while the Government obtained: (1) a royalty-free license to use the invention (*see* 48 CFR 52.227-11(b)); and (2) the right to give to a larger company the *production* contract and the opportunity to make all the money. Society was thus harmed because what otherwise would be a terrific source of innovation—*i.e.*, the individual, undercapitalized inventor—was stifled. *See* S. Rep. 97-194, 182 U.S.C.C.A.N. 512, 515.

SBIR was Congress' effort to provide the necessary protections for and incentives to small businesses. This case concerns one key component of the SBIR program—§638. Under §638, if an agency decides to pursue development or production of technology it obtains under a SBIR contract, the agency is required, whenever practicable, to

award such development or production contracts to the SBIR Developer who introduced the technology to the Government. As a result, the small innovator is assured that he or she will not invest in the development of a product only to be cut out at pay-off time.

SBIR contracts are awarded in three "phases."

- **Phase I** is a competitive procurement for a contract award funded by the SBIR program. The object of Phase I is to conduct experimental or theoretical research and development related to described agency requirements.
- **Phase II,** which is rarely awarded, continues the research and development effort from Phase I. Only the Phase I awardee (*i.e.*, the SBIR Developer) is eligible for Phase II contracts.
- **Phase III** refers to *any* work that derives from, extends, or logically concludes efforts performed under SBIR funding agreements, but is funded by sources other than SBIR. Only the SBIR Developer is eligible for a Phase III award.

67 FR 60072, 60084-85. Thus, §638 requires "to the greatest extent practicable, that agencies issue Phase III awards to the SBIR awardee that developed the technology." *Id.* at 60075-76. It is in this context that we turn to the facts of this case.

C. Night Vision Goggles

The U.S. military has used "ANVIS" night vision goggles

since 1982. (Ex. 560 at 5.)[2] Although ANVIS represented the state of the art in 1994, it had and still has two major shortcomings that place our pilots in danger. *First*, ANVIS goggles have limited peripheral or "panoramic" view. Although the normal daytime field of view is about 180 degrees, ANVIS allows a view of only 40 degrees. (Ex. 9 at 10.) This lack of peripheral vision influences misperceptions and illusions and aggravates the risk of collisions with mountains, structures or other aircraft. (Ex. 107 at 3.) During only the first decade of ANVIS goggle use, more than 183 GIs died, and hundreds of others were injured, in more than 88 helicopter accidents where the pilot used those goggles. (*See id.*)

Second, ANVIS has a poor center of gravity, protruding straight out from the pilot's face. For this reason, it is not "ejection compatible," and endangers pilots of fixed wing aircraft. If a pilot must eject from the plane in an emergency, there is an expectation that the pilot will experience serious head and neck injuries or even be killed. (Ex. 9 at viii; Ex. 12; Ex. 560 at 5.) There is a long and well-documented history of such injuries. (*Id.*)

D. NVC's Revolutionary "PNVG" Goggle

NVC is a company of only three employees led by world renowned inventor Danny Filipovich ("Filipovich"). In 1994, it introduced the Air Force to its revolutionary and life-saving Panoramic Night Vision Goggle system called the "PNVG I." (Affidavit of Filipovich ("D.F. Aff.") ¶¶4, 14-17; Ex. 13 at DE110534; Deposition of Thomas Karacic

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[2] Citations to "Ex." refer to the Exhibits in NVC's Appendix of Exhibits filed in the Court of Federal Claims on March 11, 2005 [Docket no. 46], and NVC's Supplemental Appendix filed in the Court of Federal Claims on July 29, 2005 [Docket no. 76] (collectively, hereinafter, "CFC Exhibits").

("Karacic Dep.") 158-59.)[3] The system was revolutionary because it provided Air Force pilots with panoramic vision, *i.e.*, a 100° field of view, as opposed to ANVIS' 40°. (D.F. Aff. ¶¶14-18; Ex. 12 at AF887.) It was life-saving because it used optical folding technology to bring the center of gravity closer to a pilot's face, enabling pilots to safely eject in an emergency. (*Id.*; Ex. 8; Ex. 13 at DE110534.)

E. SBIR Phase I

On May 16, 1995, the Air Force awarded NVC a SBIR "Phase I" contract—providing NVC $80,000 to build a PNVG prototype. (D.F. Aff. ¶17.) Phase I launched what the Air Force described as a "revolution" in night vision goggles. (Ex. 13 at DE110534; Deposition of Judith Demos ("Demos Dep.") 9.) NVC's prototype expanded the field of view by 160 percent, while improving the center of gravity for ejection safety. (D.F. Aff. ¶18.) PNVG was lauded by the Air Force as a breakthrough that would replace the inferior ANVIS and improve pilot safety and mission effectiveness. (Exs. 8, 12, 107.) PNVG ultimately passed all necessary safety tests and was given flight clearance. (Ex. 232 at NV10269, 10551-53; D.F. Aff. ¶45.) PNVG I remains the *only* night vision goggle to pass all Air Force ejection safety tests. (D.F. Aff. ¶50.)

F. SBIR Phase II

On July 12, 1996, the Air Force awarded NVC a $4.2 million Phase II contract, which, as amended, required NVC to produce 12 PNVG prototypes. (*Id.* ¶31.)

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[3] All affidavits and deposition transcripts cited herein are included in the CFC Exhibits.

G. Insight

Early in 1997, Air Force personnel advised NVC to begin making arrangements for Phase III. They told Filipovich that NVC must either hire a subcontractor with the production capability required for Phase III, or develop the production capability itself. (*Id.* ¶20.)

Insight Technology Inc. ("Insight") is a manufacturing company with a history of working on Government contracts. (*Id.* ¶22; Ex. 434 at 52.) It was created in 1987 by its President Kenneth Solinsky ("Solinsky"). (Deposition of Solinsky ("Solinsky Dep.") 9.) Solinsky was an Army employee during the 1980s, and was the program manager responsible for the Army's production of ANVIS. (D.F. Aff. ¶22; Ex. 434 at 52.) Insight employed powerful lobbyists and had a close relationship with then powerful New Hampshire Senator Robert Smith. (*See* Exs. 41, 42, 44, 45, 113, 305, 316, 359.)

Unbeknownst to NVC, the Air Force and/or Army informed Insight about NVC's PNVG program and discussed with it the enormous promise of NVC's prototype. (*See* Ex. 15.) And, then, the Government requested that NVC hire Insight as a parts subcontractor under Phase II. (D.F. Aff. ¶21; Suppl. Aff. of Filipovich ¶2.) NVC did *not* need such a subcontractor during Phase *II*, given the small quantity of prototypes it was being asked to produce. (Karacic Dep. 158-59.) NVC hired Insight only because the Air Force said it was necessary for Phase *III*. (D.F. Aff. ¶21.)

H. The Government's Phase III Promises

Consistent with §638, during Phase II Judith Demos ("Demos")—the Air Force Contracting Officer responsible for the PNVG program—and various other Air Force representatives repeatedly assured NVC that, if Phase II

succeeded, NVC would get a large scale production contract, *i.e.*, Phase III. (*Id.* ¶38; Karacic Dep. 156-59; Solinsky Dep. 45-46, 188.) These assurances were affirmed by the parties' statements and conduct throughout the course of Phase II. (*E.g.*, Exs. 42, 62, 64, 79, 85A ¶14, 91, 113, 151, 153, 154, 163, 198, 745; Karacic Dep. 228-47; Deposition of Wallace Woodman 55-57.)

I. Insight Procures Phase III Funding, And Gains Influence

An essential part of the preparations for Phase III included raising the necessary appropriated funds. During Phase II, Insight flexed its political muscle to raise millions of dollars in "plus-up" Congressional funding for PNVG procurement. (*See* Exs. 41, 42, 44, 45, 113, 305, 316, 348, 359.) However, the dirty secret about the "plus-up" money was that it came with political baggage—according to the Government, it was earmarked for the constituent (Insight) of the Congressperson (Smith) who spearheaded the fund raising effort. (Ex. 305 at AF200544 ("[t]he plus up was written so the money would go to the sub rather than the prime"); Ex. 316.) Indeed, Insight's political influence was expressly recognized by Air Force Program Manager Randy Brown: "Insight Technology had their Congressional supporters submit [a] letter and Insight also worked the plus-up for the FY '99 funds that we still have unobligated. I am sure they will raise a big ruckus and submit another Congressional letter if the funds are used by Air Force for purposes other than PNVG." (Ex. 316.)

Insight's fund raising success gave it great leverage with the Government, which Insight applied aggressively to entrench itself in the future of the PNVG program. On several occasions, Insight (then, only a *subcontractor* of NVC) threatened to stop all work on Phase II unless it received exclusive PNVG manufacturing rights from NVC.

(D.F. Aff. ¶35; Exs. 64, 79 at DE 002988; Affidavit of Karacic ("Karacic Aff.") ¶3; Deposition of Filipovich ("Filipovich Dep.") 208-09; Karacic Dep. 174-75, 213-16.) NVC, turned off by Insight's heavy handed politicking and shoddy work, initially refused one threat after another. (*Id.*; Filipovich Dep. 210-13.) But Insight would not relent and, *astonishingly*, obtained the Air Force's *support*. At a meeting at Wright-Patterson Air Force Base on July 8, 1998, under duress from the Air Force, NVC finally agreed to make Insight its exclusive manufacturer for the first 7,000 PNVGs produced during Phase III. (Karacic Dep. 230-40; Karacic Aff. ¶11; D.F. Aff. ¶46; Filipovich Dep. 216, 222-24, 293-94; Exs. 74, 90, 91.) At the meeting's end, NVC asked the Air Force's Brown what drove the program—NVC's technology or Insight's plus-up money. (Karacic Dep. 245; Karacic Aff. ¶12.) Without hesitation, Brown said it was the plus-up money, and that the Air Force was already spending it. (Karacic Dep. at 245-47.)

J. Insight Moves In

In April and May 1999, without NVC's knowledge, the Air Force began negotiating directly with Insight concerning Phase III. (Exs. 151, 153.) Recognizing NVC's Phase III rights, the Air Force also urged NVC to sell those rights to Insight. (Ex. 163; Solinsky Dep. 217-18.) Indeed, Brown told Filipovich that if NVC chose any partner other than Insight for Phase III, it would be a "high risk" to the program. (Ex. 191.) All of this was improper because §638 required the Air Force to award any Phase III contract to *NVC* (if practicable) and, by the Air Force's admission, the Government "should not force a prime contractor to use a subcontractor against his will." (Ex. 264 at AF200633.)

Even though §638 requires, if practicable, "that agencies issue Phase III awards to the SBIR awardees that developed the technology" (67 FR 60072, 60075-76), on June 24,

1999, the Air Force told Filipovich that it did not want to offer Phase III to NVC but, instead, wanted NVC to transfer its PNVG technology to Insight and become Insight's consultant. (D.F. Aff. ¶63.) On that call, the Air Force threatened Filipovich that if he refused, there would be no Phase III. (*Id.* ¶¶64-66.)

K. Completion Of Phase II

On July 30, 1999, NVC completed Phase II. (*Id.* ¶70.) According to Program Manager Brown: (1) the prototypes "exceeded [the Air Force's] expectations on quality and performance" (Ex. 315); and (2) PNVG "offer[ed] the potential to provide a 'giant leap' in all USAF aircraft for 'air crew situational awareness,' 'mission performance' and 'survivability' (Ex. 348 at AF200947). Brown identified over $23 million that would be available between 2000 and 2003 for PNVG. (*Id.* at AF200961.)

L. The Air Force Admits That It Promised Phase III To NVC

On August 27, 1999, the Air Force held an internal meeting to discuss PVNG program strategy. (Exs. 251, 253, 275, 277.) Notes taken by Mary Jones—who had succeeded Demos as the PNVG Contracting Officer (Demos Dep. 44)—contain the admission that Jones and Air Force counsel Muldoon both believed NVC had been "promised" a Phase III award by the Air Force. (Ex. 277.) Jones' notes also indicate that although the Air Force did not want to contract with NVC, it had determined it may have no choice but to request a proposal. (Ex. 270.) According to Jones' notes, the "bottom line" was:

> The lab needs to define its requirement and $. We need to get back on the straight road and if that

> means us requesting a proposal then let's do it. We have to be able to live with it.

(*Id.*) However, instead of "getting back to the straight road," only three days later the Air Force repeated that it would not consider a Phase III contract to NVC. (Ex. 280 at AF200608.)

M. "Open Competition"

Having decided to pursue what the Air Force described as the "revolutionary" PNVG goggles—but also having decided to ignore its statutory and contractual obligations to do so with NVC and instead, to give the contract to Insight—the Government needed to concoct an alternative procurement procedure through which to do this. Although the Government called the new process an "open competition," it was anything but. Indeed, because of the confidential nature of the technology—known only to NVC and Insight—there were only two *viable* potential bidders. Yet, the Government had already decided that it did not want to give the contract to NVC. (Exs. 270, 745.) After all, the Air Force had already told NVC not to even "waste the time and money to prepare a [Phrase III] proposal," and the Air Force counsel suggested that the Air Force ask NVC for a written proposal, get it and "not award it." (Ex. 264 at AF200633; Ex. 267 at AF200623.) So the die was cast—the Government decided to go forward with PNVG, but, contrary to Congressional intent and the whole point of §638 (and the entire SBIR program), pushed the small business *inventor* aside and decided to give the lucrative part of the deal to Insight, the large Government insider.

N. Still Not Safe

Since April 2000—under Insight's direction and without NVC's technical expertise—the PNVG program has

suffered terribly. As of May 2003, when NVC filed this suit, Insight's knock off version was still failing ejection safety tests that NVC passed in January 1999. (Ex. 625 at DE33350-51.) Meanwhile, pilots have been deprived of the PNVG's benefits and NVC has been systematically excluded from the program it began.

O. This Litigation

NVC's five-count complaint alleged contract and other procurement-related claims against the Government. The Court of Federal Claims had jurisdiction over NVC's claims under the Tucker Act, 28 U.S.C. §1491. The Government moved to dismiss Counts II and IV, for summary judgment on Counts I and III and for judgment on the administrative record on Count V. NVC moved for partial summary judgment on Counts I, II and IV. The court denied NVC's motion, granted the Government's motion, and entered judgment for the Government on all counts.

NVC appealed the rulings as to Count II (breach of written contract) and Count III (breach of oral/implied-in-fact contract), and the Federal Circuit affirmed.

REASONS FOR GRANTING THE WRIT

I. Summary Of Reasons For Granting The Writ

A. First Issue—The Federal Circuit's Erroneous Construction Of Section 638

Important issue. The Federal Circuit eliminated with a stroke of its pen one of SBIR's principal features: §638's requirement that, to the greatest extent practicable, agencies that decide to pursue SBIR innovations *must* award Phase III contracts to the SBIR contractor that developed the technology in the first place (*i.e.*, the SBIR Developer). The impact will be felt immediately by small businesses. The impact on the Government—in particular, on its ability to attract innovative technology—will be felt more gradually, but is just as significant.

Of course, the issue is important to the parties because reversal would reinstate Count II. Moreover, the issue is an extremely important issue of federal law generally. Several factors make this important question particularly appropriate for review by this Court. *First*, it is a question of first impression. *Second*, it is exclusively a question of statutory interpretation, which will have broad implications for *all* small business concerns. *Third*, it is ripe for decision because the Federal Circuit—the *only* jurisdiction in which a contractor can bring procurement-related claims against the Government—is likely to be the *only* Circuit ever to decide the issue. Thus, there will likely never be a Circuit split. *Fourth*, the issue concerns a policy of vital importance, because §638 is an essential component of the rights created by SBIR to protect small businesses and give them incentive to bring innovations to the Government. *Finally*, the Circuit's ruling in this landmark case was wrong.

Wrong ruling. Under any fair reading, §638 requires:

- "that an agency which intends to pursue research, development, or production of"

- "technology developed by a small business concern under a SBIR program"
- "enter[ ] into follow-on, non-SBIR funding agreements with the small business concern for such research, development, or production"
- "to the extent practicable."

In this case, there is abundant—perhaps irrefutable—proof of each of those elements:

- the Air Force decided to pursue advanced development and production of
- the "revolutionary" PNVG technology developed by NVC under its Phase I and Phase II SBIR contracts,
- *but refused* to enter into a follow-on, non-SBIR funding agreement (*i.e.*, "Phase III") with NVC for such development and production,
- *despite* that it *was* practicable to do so.

Indeed, the record evidence is startling, both for its volume and content. It shows how the Air Force deliberately removed NVC as prime contractor in favor of Insight, the manufacturing company that had been hand picked by the Air Force, whose lobbyists had raised the funding for the follow-on contract, and for whose benefit that funding had been "earmarked." (Ex 305 at AF200544.)

Yet, the Federal Circuit avoided the need to consider *any* evidence because it decided that §638 does not *require*, but only "*favors*" Phase III awards and, thus, that the statute creates no enforceable rights for small businesses and imposes no obligation on government agencies. (A9-10.) The Circuit reached its conclusion by giving undue emphasis to the statute's prefatory language, which requires the SBA Administrator "to provide for . . . procedures to

ensure" that agencies conduct themselves in accordance with the statutory mandate. (*Id.* at 9.) By focusing only on this prefatory text, the court reached its remarkable decision that §638 "deals with 'procedures' to accomplish the stated objective; *it does not mandate particular action to achieve those results.* (*Id.*) In doing so, the Circuit interpreted §638 in a manner contrary to (1) the statute's plain language, (2) the SBA's *own* interpretation, and (3) the express purpose of the underlying legislation.

B. Second Issue—The Federal Circuit's Erroneous Ruling Regarding Contracting Authority

The Circuit disposed of NVC's alternative, oral/implied contract claim (Count III) in a manner that also warrants review by this Court. Despite evidence in the record supporting every element of NVC's claim, including the *written admission* from an Air Force Contracting Officer *and* Air Force counsel that they believed "NVC had been promised a Phase III," the Circuit affirmed summary judgment in the Government's favor on the grounds that there was one "fatal flaw" in NVC's case. The purported flaw was that Demos, the Contracting Officer responsible for the PNVG procurement, lacked authority to make the alleged contract with NVC. The Federal Circuit held that although a Contracting Officer has "broad discretion to execute and amend contracts, administer contractual performance and decide contractual claims," he or she somehow *lacks* authority to "determin[e] the type of procurement to be used for a particular transaction." (A11.) The Circuit so held without citation to *any* law or fact.

Important issue. This ruling is significant because the Circuit purported to articulate a universally applicable rule which, if it stands, would redefine the scope of authority possessed by all Contracting Officers. Also, as

with the first issue, this issue is unique to government procurement disputes and, for that reason, may never be decided by any other Circuit. Finally, reversal would reinstate Count III.

Wrong ruling. Not only did the Circuit cite no legal or factual authority for its new sweeping rule concerning the authority of Contracting Officers, but also that new rule would be in derogation of express federal regulations and long-established common law.

II. The Reasons For Granting The Writ As To The First Issue—The Federal Circuit's Erroneous Construction Of Section 638

A. Important Ruling

1. Issue Of First Impression

This is the first case in which a court has decided whether §638 binds the Government.

2. Broad Implications

The Federal Circuit affirmed Count II's dismissal because it found that §638 "imposes no duty on the government to award a Phase III contract" and "creates no rights for any private entities." (A10.) This ruling was solely a product of the Circuit's legal interpretation of §638 and the regulations promulgated thereunder and, for that reason, it will have broad implications beyond this case. At a minimum, it will apply universally to SBIR Developers and limit their rights accordingly. Worse yet, unless reversed, the ruling is likely to dissuade many small business innovators from ever *seeking* SBIR contracts.

3. Exclusive Jurisdiction

Review is also appropriate because §638 concerns Government procurement, and procurement-related disputes are exclusively within the jurisdiction of the Court of Federal Claims and the Federal Circuit. *OTI America, Inc. v. U.S.*, 68 Fed. Cl. 108, 112 (2005). Thus, there will likely never be a Circuit split. The issue is ripe now.

4. Policy Implications

For the reasons recited above, this case will produce the *first*, and likely the *last*, interpretation of §638 by any federal District Court or Court of Appeals. Accordingly, it does not overstate the matter to say that the Federal Circuit's ruling will bar all SBIR Developers from asserting a right to receive a sole source Phase III contract. By the same token, the Circuit's ruling will give the Government a free pass to perpetuate the flawed procurement practices that Congress believed were "discriminating against small enterprise," "wasting vast amounts of taxes" and "contributing to the erosion of our economic dynamism," and that it intended for SBIR to remedy. Worse still, the Circuit's ruling gives back to Government agencies the very discretion that Congress thought it had taken away.

The Circuit seemed to miss this point entirely when it said "Night Vision's position would seriously limit the government's ability to select the form of procurement that it considers most appropriate in the particular situation." (A9.) Yet, that was precisely the purpose behind SBIR—to correct the inclination of the executive branch, when left unchecked, to make procurement decisions that discriminated against small businesses, and inhibited innovation. As explained below, Congress *did* intend for §638 to create enforceable rights for SBIR Phase II contractors, and the Circuit's contrary ruling was in error.

B. Wrong Ruling

The gist of NVC's written contract claim in Count II is that, because all government contracts are deemed to incorporate applicable laws (as the Court of Claims, Federal Circuit and even the Government conceded), the SBIR Phase *II* contract implicitly included §638 and the regulations promulgated thereunder (collectively, the "SBIR Laws"). In turn, the SBIR Laws required the Government to award NVC a Phase *III* contract provided *only* that: (1) the Government intended to pursue further research, development or production of the PNVG technology; and (2) a Phase III award to NVC was "practicable" (collectively, the "Two Conditions"). Thus, the Air Force breached the contract by refusing to award NVC Phase III.

The Federal Circuit found only one fault with Count II—it held there was nothing to incorporate into the Phase II contract because §638 "imposes no duty on the government to award a Phase III contract" and "creates no rights for any private entities." (A10.) However, as shown by the statute's text, the SBA's own interpretation thereof, and the policy behind SBIR, the SBIR Laws plainly *do* require Phase III awards to the SBIR Developer *whenever* the Two Conditions are met.

1. The SBIR Laws Are Obligatory

a. Plain Text Of Section 638

Section 638 provides that:

> Not later than 90 days after October 28, 1992, the [SBA] Administrator shall modify the policy directives issued pursuant to this subsection to provide for . . . procedures to ensure to the extent practicable, that an agency which intends to pursue research, development, or production of a technology developed by a small business concern

> under a SBIR program enters into follow-on, non-SBIR funding agreements with the small business concern for such research, development, or production.

Under any reasonable reading, §638 requires two things: (1) that an agency that pursues technology developed by a SBIR Developer must, if practicable, award Phase III to that Developer; and (2) that the SBA implement procedures to ensure this requirement is carried out. The Circuit erred in ignoring the former component, and treating the statute as consisting only of the latter. The Circuit held that §638 "deals with 'procedures' to accomplish the stated objective; it does not mandate particular action to achieve those results." (A9.) This reading is patently unreasonable—for two reasons.

First, it flips the system on its head. SBA's function is to *implement* the *statute* by providing guidance to federal agencies. *See* 67 FR 60072, 60072. The SBA cannot alter or weaken a statutory requirement. *See Horner v. Hollander*, 895 F.2d 759, 761 (Fed. Cir. 1990) (courts must reject regulations inconsistent with Congressional intent or policy). Thus, the basic substantive rule—as to which the SBA is charged with ensuring compliance—originates from §638, and exists with the same force regardless of the manner in which SBA carries out its assigned task.

Second, it strips the statute of its plain meaning. Section 638 states that the SBA "*shall*" modify its *binding* policy directives "to *ensure*" that SBIR Developers obtain Phase III contracts if the Two Conditions are met. It is unreasonable to hold that a statute that *orders* an agency to develop procedures to *ensure* compliance with a particular standard does not, itself, mandate that standard. In other words, a statute that requires the relevant governmental agency to *ensure* that "X" happens, is a requirement that "X" happens. This is especially true here, where the particular body of regulations that the statute orders the

SBA to promulgate—*i.e.*, the SBIR Policy Directive—itself has the force of law and is binding on government agencies. 67 FR 60072, 60082.

Indeed, the bigger picture is that the Circuit's ruling would strip the statute of *any* meaning. It would defeat Congress' efforts through the SBIR Laws to remedy the Government's discriminatory procurement habits, and halt the "erosion" of the Government's "economic dynamism." S. Rep. 97-194, 182 U.S.C.C.A.N. 512, 515. There is no more obvious way to defy Congress' intent. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (court must, if possible, interpret statute in a manner that gives every word meaning and effect.) A far more reasonable reading of §638 is that Congress' decision to condense the two components—*i.e.*, the underlying Phase III requirement, and the order to the SBA to carry out that requirement—reflected only economy of words, and *not* an intent to make the underlying obligation illusory.

b. SBA Interpretation

Further, in violation of *Chevron U.S.A, Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-45 (1984), the Federal Circuit failed to give due deference to the SBA's *own* interpretation of §638:

> It is clear that Congress intends, to the greatest extent practicable that agencies issue Phase III awards to the SBIR awardees that developed the technology.

67 FR 60072, 60075-76. The judiciary's role is to determine and implement Congressional *intent*. *Chevron*, 467 U.S. at 843, n.9. Here, the SBA, the relevant agency, determined that intent, but the Circuit failed to give deference thereto.

c. SBIR Policy

Finally, the obligatory nature of the SBIR Laws regarding Phase III promotes SBIR's overriding policy of giving small businesses incentives to participate in SBIR, which in turn will strengthen government research and development programs. *See* 15 U.S.C. §638(a); S. Rep. 97-194, 182 U.S.C.C.A.N. 512, 515. Indeed, without the Phase III requirement, few, if any, contractors would seek or accept SBIR contracts. Yet, that was the very situation Congress attempted to remedy with §638. Thus, if the Circuit is correct, then §638 accomplished nothing—*i.e.*, the agencies will retain the same unbridled *discretion* that they had before SBIR was enacted.

2. The Federal Circuit's Flawed Reasoning

The Circuit gave two principal reasons for its conclusion. *First*, it erroneously perceived §638 to be what is known as a "housekeeping" statute—*i.e.*, one that governs only internal procedural matters, and does not create substantive rights or obligations. (*See* A8-10.) *Second*, it misconstrued the SBIR Policy Directive as indicating that the SBIR Laws impart *discretion*—not an obligation—to award Phase III. (*Id.* at 10.) The Circuit was wrong in both respects.

a. The SBIR Laws Are Not "Housekeeping" Provisions

As explained above, the Federal Circuit's "housekeeping" interpretation places undue emphasis on §638's prefatory language ("the Administrator shall modify the policy directives") and is at odds with its full text and the broader SBIR regulatory scheme, all of which reflects that—as confirmed by the SBA itself—Congress' intent was to *ensure* that SBIR Developers receive Phase III contracts when the Two Conditions are met.

In this respect, §638 is different from any other statute found to be a mere "housekeeping" statute. The two "housekeeping" statute cases on which the Court of Federal Claims relied below—*Schism v. U.S.*, 316 F.3d 1259, 1279 (Fed. Cir. 2002), and *AT&T v. U.S.*, 307 F.3d 1374, 1380 (Fed. Cir. 2002)—demonstrate the distinction. *Schism* addressed a statute that provided that "the head of an Executive department or military department *may* prescribe regulations for the government of *his* department." 316 F.3d at 1279 (emphasis added). Clearly, this language concerns internal "rules of organization, procedure or practice, as opposed to substantive rules." *Id.* Likewise, the statute in *AT&T*—without purporting to say how or if the Department of Defense could or must spend money—provided only that it could not obligate more than $10 million on fixed price contracts until it complied with certain *internal* procedures and *reporting* requirements. 307 F.3d at 1376. There, too, the statute on its face concerns only matters of internal governance.

The subject of §638, on the other hand, is *not* merely the internal workings of government. Section 638 expressly addresses government agencies' *substantive* obligations *to third parties*—SBIR Developers—and describes those obligations with particularity, in a *mandatory* way. In no way can §638 fairly be compared to "housekeeping" statutes. *See Chris Berg, Inc. v. U.S.*, 426 F.2d 314, 317-18 (Ct. Cl. 1970) (regulation that "appears intended to define and state the rights of a class of persons" is presumptively intended to benefit those persons, and binds government officers as if it were a term of the contract). The fact that §638 orders the SBA to ensure agency compliance does not change this.

b. The SBIR Laws Are Not Discretionary

The Federal Circuit's other principal rationale was its conclusion that §638 "favors" Phase III awards, but leaves

ultimate discretion with the agency to choose the procurement "that it considers most appropriate." (A9-10.) The Circuit here made the same mistake as the Court of Federal Claims made—it failed to consider the Two Conditions. True, Phase III contracts are *not an entitlement* to *all* SBIR Developers. Rather, before there is any obligation to award Phase III, the Two Conditions must be met—*i.e.*, *first*, the Government must intend to pursue research, development or production of the technology; *second*, it must be practicable to award Phase III to the SBIR Developer. Admittedly, the *first*—the decision to pursue the SBIR technology—is a matter totally within the Government's discretion. However, if that decision is made, the *second* condition is not discretionary. Practicable means "possible." *SMS Data Prods. Group, Inc. v. U.S.*, 853 F.2d 1547, 1553-54 (Fed. Cir. 1988). It has no subjective or discretionary component to it. *American Fed'n of Gov't Employees v. Fed'l Labor Relations Auth.* 715 F.2d 627, 629 & 630 n.4 (D.C. Cir. 1983). And §638 makes clear that if, as here, the Two Conditions are met, the Government has *no further discretion*—the ensuing contract is a Phase III contract, and it must be awarded to the SBIR Developer.

When read in this context, the Policy Directive provisions on which the Circuit relied are wholly *consistent* with *NVC's* reading of §638. For example, the provision stating that Phase III contracts are "not mandatory" (A8) reflects only that agencies may decide in their discretion *not* to pursue the SBIR technology with *anyone*. Likewise, the provision acknowledging that an agency may pursue a SBIR Developer's technology through an award to a *different* contractor (*id.* at 10) recognizes that this can happen *only* if a Phase III contract with the SBIR Developer is *not practicable*. The Policy Directive makes this clear by providing that:

> The Act requires each agency participating in the SBIR Program to . . . [r]eport at least annually to

> [SBA] all instances in which an agency pursued research, development, production, or any such combination of a technology developed by an SBC using an award made under the SBIR Program of that agency, where the agency determined that it was not practicable to enter into a follow-on non-SBIR Program funding agreement with that concern. The report must include, . . . the reasons why the follow-on funding agreement with the concern was not practicable. 67 FR at 60089.

Thus, reporting is simply one of the SBA's procedures to ensure that agencies do not refuse to give the Phase III award to the SBIR Developer where it is practicable to do so. It was because of Congressional concern that agencies were *misusing* the "practicability" condition that the reporting requirement was added to the SBIR Act. *See* Joint Statement of Managers From the Committee on Small Business, H.R. 2392 (October 5, 2000) at E1700. The Circuit's contrary conclusion—*i.e.*, that it demonstrates Phase III awards are "favor[ed]" but not "require[d]" (A9-10)—was erroneous.

III. The Reasons For Granting The Writ As To The Second Issue—The Federal Circuit's Error Regarding Contracting Authority

A. Important Ruling

1. Universal Application

The second issue concerns the Circuit's erroneous ruling that the authority of a U.S. Contracting Officer "does not include determining the type of procurement to be used for a particular transaction." (A11.) The ruling is not supported by citation to *any* case, statute, regulation or factual matter in the record. Thus, the Circuit purported to make a new *universally applicable* rule regarding the scope of Contracting Officers' authority, which, if allowed

to stand, would change the law and affect the rights of every government contractor, as well as the conduct of every Contracting Officer.

2. Exclusive Jurisdiction

Like the first issue, this issue is likely to arise only in procurement-related claims against the Government, which must be brought in the Court of Federal Claims and, on appeal, in the Federal Circuit. Thus, it is unlikely that there could ever be a Circuit split.

B. Wrong Ruling

The gist of Count III is that Demos, the PNVG Contracting Officer, promised NVC that it would receive a Phase III contract if the Government decided to pursue the PNVG following Phase II. The Federal Circuit affirmed summary judgment for the Government, but *only* because it held that NVC could not prove one of the essential elements of its oral, implied-in-fact contract claim—actual authority by a Government representative. (A11.) The Circuit acknowledged that the record includes evidence of an oral promise from a Contracting Officer (*id.*), but held that:

> [a]lthough the contracting officer has broad discretion to execute and amend contracts, administer contractual performance and decide contractual claims, her authority does not include determining the type of procurement to be used for a particular transaction.

(*Id.*) Although the Circuit's disposition of Count III depended entirely on this purported statement of the law, it failed to cite *any* legal authority to support it.

The only explanation given for the ruling was that, years *after* Demos and others had already made the alleged

contract, the Air Force's "Chief of Research and Development Contracting," Donald L. Utendorf, signed off on the official decision to "compete" the PNVG procurement (rather than award a sole-source Phase III contract to NVC). (*Id.*) Yet, this explains nothing about whether a Contracting Officer has authority to make an oral Phase III contract or authority, as a general matter, to "determine the type of procurement to be used." Moreover, contracting authority either exists, or not, at the time the alleged contract is made; it cannot turn on a party's *unilateral* conduct years *after* the fact. (*See* discussion of *Brunner*, *infra*.) Indeed, if unpublished limits or after-the-fact conduct could defeat a Contracting Officer's authority, it would devastate public confidence in government contracting.

In any event, the Circuit was wrong—NVC *can* prove authority. In fact, whether Demos' authority is deemed express or implied, it is clear that she had it. As the title suggests, a "contracting officer" has authority to contractually bind the Government. The Federal Circuit explained it this way in another case: "[t]he contracting officer is the official representative of the government in doing business with the public." *LDG Timber Enterp., Inc. v. Glickman*, 114 F.3d 1140, 1143 (Fed. Cir. 1997). Indeed, according to the Federal Acquisition Regulations:

> Contracting officer means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings.

48 CFR 2.101. It is undisputed that Demos was the Air Force's designated Contracting Officer for the PNVG program at the relevant time (*see* A20), and there is *no* evidence that Demos lacked the authority to make the alleged promises. Indeed, Demos' authority is implicitly confirmed by the admission by Jones (Demos' successor and herself a Contracting Officer) and Muldoon (an Air

Force lawyer) that they believed NVC had been "promised a Phase III." (Ex. 277.)

At the very least, there is a question of fact as to whether Demos had *implied* authority. Authority to bind the government is generally implied "when such authority is considered to be an integral part of the duties assigned to a government employee." *Arakaki v. U.S.*, 62 Fed. Cl. 244, 262 (2004) (quoting *H. Landau & Co. v. U.S.*, 886 F.2d 322, 324 (Fed. Cir. 1989)). Indeed, promises and representations made by a contracting officer "within the scope of the subject matter" of a contract are *prima facie* within the contracting officer's assignment, and "can not be avoided by simply disclaiming the contracting officer's authority when the contract reaches litigation." *LDG*, 114 F.3d at 1143.

The *Brunner* case contains an instructive overview of the law regarding implied contracts and implied contracting authority in government contracting. *See Brunner v. U.S.*, No. 98-554C, 2006 WL 1189492, at *2 (Ct. Cl. May 2, 2006) (finding that implied-in-fact contract was formed based on Government agent's implied authority). That court explained that actual contracting authority is *not* limited to authority expressly provided by law, but *also* includes authority "implied by the factual record." *See id.* at *12, 18-20 ("it has long been settled that an agent may have an implied authority to contract on behalf of the government, based on a consideration of the duties of that agent, and whether the power to contract was appropriate or essential to their performance"). Consistent with the established principles discussed in *Brunner*, Demos, as the designated "Contracting Officer" for the follow-on PNVG contract, unquestionably had *at least* implied authority to make the alleged oral contract.

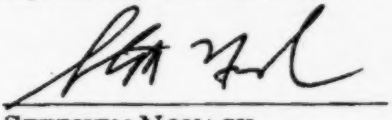
As *Brunner* further explains, the *only* way in which such authority may be limited is through publication of a statute or regulation that provides *notice* of the limitation.

Id. at *23. The Federal Circuit's ruling that Utendorf's after-the-fact actions can retroactively undo Demos' authority is directly contrary to this settled law. Indeed, there simply is no statute or regulation that limits a Contracting Officer's authority to "determine the type of procurement to be used for a particular transaction." Here, NVC had *no* notice, nor any reason to believe that the promises from Demos—the PNVG Contracting Officer—regarding the next PNVG contract were not fully authorized.

CONCLUSION

For the foregoing reasons, the Court should grant this Petition for a Writ of Certiorari and ultimately reverse the decision of the Federal Circuit.

Respectfully submitted,



STEPHEN NOVACK
Counsel of Record
P. ANDREW FLEMING
JOHN F. SHONKWILER
NOVACK AND MACEY LLP
100 North Riverside Plaza
Chicago, Illinois 60606
(312) 419-6900

Counsel for Petitioner

APPENDIX

APPENDIX TABLE OF CONTENTS

Page

Opinion from the United States
Court of Appeals for the Federal Circuit,
November 22, 2006 2

Opinion from the Court of Federal Claims,
October 25, 2005 14

SBIR Program Policy Directive,
September 24, 2002,
67 FR 60072 (excerpts) 79

App. 2

United States Court of Appeals for the Federal Circuit

06-5048

NIGHT VISION CORP.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Stephen Novack, Novack and Macey LLP, of Chicago, Illinois, argued for plaintiff-appellant. On the brief was James S. DelSordo, Cohen Mohr LLP, of Washington, DC. Of counsel on the brief were P. Andrew Fleming and John F. Shonkwiler, Novack and Macey LLP, of Chicago, Illinois.

Kyle E. Chadwick, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With him on the brief were Peter D. Keisler, Assistant Attorney General, and David M. Cohen, Director. Of counsel was Mark A. Melnick, Assistant Director.

Jere W. Glover, Brand Law Group, P.C., of Washington, DC, for amici curiae. With him on the brief was Andrew D. Herman. Of counsel on the brief was Paul J. Seidman, Seidman & Associates, P.C., of Washington, DC.

Appealed from: United States Court of Federal Claims

Judge Lawrence J. Block

United States Court of Appeals for the Federal Circuit

06-5043

NIGHT VISION CORP.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

DECIDED: November 22, 2006

Before MAYER, Circuit Judge, FRIEDMAN, Senior Circuit Judge, and GAJARSA, Circuit Judge.

FRIEDMAN, Senior Circuit Judge.

A small business concern contends that it had a contractual commitment with the Air Force that, if it successfully completed the first two phases of a research and development contract, it would be awarded the contract for further development and ultimate production of the device it developed; and that the Air Force breached this commitment when it awarded the production contract to another company. The Court of Federal Claims dismissed the breach-of-contract suit that the small business had filed, ruling that the Air Force had not made any such contractual commitment. Night Vision Corp. v. United States, 68 Fed. Cl. 368 (2005). We affirm.

I

Congress created the Small Business Innovation Research ("SBIR") program to assist small-business concerns in obtaining and performing research and development work. See 15 U.S.C. § 638(a)-(d). The program requires federal agencies to reserve some of their research and development funds for small businesses. See 15 U.S.C. § 638(e)(4). The SBIR program has three phases. Phase I involves "determining . . . the scientific and technical merit and feasibility of ideas that appear to have commercial potential." Id. § 638(e)(4)(A). Phase II is designed "to further develop proposals which meet particular program needs." Id. § 638(e)(4)(B). Phase III involves "commercial applications of SBIR-funded research and development" or "products or services intended for use by the Federal Government, by follow-on non-SBIR Federal funding awards" or "the continuation of research or research and development that has been competitively selected using peer review or scientific review criteria." Id., § 683(e)(4)(C). Funding for Phase III is provided by either "non-Federal sources of capital" or "non- SBIR Federal funding." Id.

A. The basic facts in this case, as found by the Court of Federal Claims, are largely undisputed. The Air Force awarded the appellant Night Vision Corporation ("Night Vision"), a small business concern, successive Phase I and Phase II contracts to develop improved "Panoramic Night Vision Goggles" ("Goggles"), which would have a broader field of view than existing Goggles.

After Night Vision successfully developed a prototype under the Phase I contract, it entered into a Phase 11 contract to produce twelve prototypes of the Goggles. Night Vision, which had only three employees, hired Insight Technology, Inc. ("Insight"), which was not a small business, as a subcontractor to assist in performing the contract.

During Phase II, the Air Force indicated to Night Vision that it might receive a Phase III contract. Night Vision, 68 Fed. Cl. at 372. That possibility led to tensions between Night Vision and Insight, which demanded that Night Vision guarantee that Insight would be the Phase III subcontractor and would participate in production of Goggles following the completion of Phase III. Id. The Air Force ultimately mediated this dispute, after Insight stopped working on the project, thereby endangering the completion of the Phase II contract. Insight resumed performance of the subcontract and the Air Force continued to discuss with Night Vision the possibility of a Phase III contract. Id. at 372-73.

In the Spring of 1999, when performance of the Phase II contract was well under way, the Air Force began to investigate options other than a Phase III contract with Night Vision for producing the Goggles; including directly contracting with Insight. Id. at 373. On June 24, 1999, the Air Force first informed Night Vision that it was unlikely that it would be given a Phase III contract for the Goggles. Four days later, the Air Force officially announced it was considering a competitive procurement. Id.

Night Vision successfully completed the Phase II contract on July 30, 1999. On August 27, 1999, the Air Force told Night Vision at a meeting that it was considering whether to use a Phase III contract or hold a competitive procurement. Id. at 374-75. When Night Vision indicated its unwillingness to submit a Phase III proposal unless it was likely to result in a contract, the Air Force responded that no guarantees could be made. Id. at 375. At this meeting, the Air Force's contracting officer took notes that reflected her belief that Night Vision had at some point been promised a Phase III contract, though she did not indicate when, or by whom, she believed this promise was made. Id. Night Vision never submitted a Phase III proposal.

In December 1999, the Air Force issued a Program Research and Development Announcement for Goggles, which initiated the competitive procurement process. Id. at 375-77. Three companies submitted bids: Night Vision, Insight, and Litton Systems, Inc. ("Litton"). The Air Force rated Insight first, Litton second, and Night Vision third, and awarded the contract to Insight.

B. Night Vision then filed a five-count complaint in the Court of Federal Claims. The court rejected all of those claims. We discuss only those claims that Night Vision pursues in this appeal.

The Court of Federal Claims dismissed, under its Rule 12(b)(6), for failure to state a valid claim for relief, Night Vision's claim that the Air Force had breached a written contract that if Night Vision successfully completed Phases I and II of the research and development contract, it would be awarded a Phase III production contract. Night Vision's theory was that the Air Force's contractual commitment was provided by a statutory provision that it contends was incorporated into the Phase I and Phase II contracts. The Court of Federal Claims rejected this argument "because the statute plaintiff seeks to incorporate into the contract . . . imposes no obligation or duty on either party to the contract." Id. at 371.

The court granted summary judgment for the United States on Night Vision's claims that the Air Force (1) had made the same commitment in an oral contract it had entered into with Night Vision, which the Air Force breached, and (2) had breached an implied-in-fact contract with Night Vision containing that commitment. The court so ruled "because plaintiff has failed to produce evidence that a government representative with contracting authority made a contract with plaintiff." Id. at 371.

II

A. The only written contracts relating to these arrangements between Night Vision and the Air Force apparently were the Phase I and Phase II agreements. As Night Vision indicates, neither of these documents contained any explicit commitment that if Night Vision successfully completed the first two phases, it would receive a Phase III contract.

Night Vision contends, however, that such a commitment was provided in a statutory provision which, it argues, the Phase I and Phase II contracts should be deemed to incorporate. It relies on the principle that "[t]he law in effect when a Government contract is made becomes a part of the contract." Jackson v. United States, 216 Ct. Cl. 25, 36 (1978). Whatever may be the meaning and scope of that principle in other situations, however, the statute that Night Vision invokes does not provide such a commitment.

That statute is 15 U.S.C. § 638(j), which is captioned "(j) Small Business Administration policy directives for the general conduct of small business innovation research programs," and provides in pertinent part:

> (1) Policy directives
>
> The Small Business Administration . . . shall, within one hundred and twenty days of July 22, 1982, issue policy directives for the general conduct of the SBIR programs within the Federal Government, including providing for —
>
> . . . .
>
> (2) Modifications
>
> Not later than 90 days after October 28, 1982, the Administrator shall modify the policy directives issued pursuant to this subsection to provide

for —

. . . .

(C) procedures to ensure, to the extent practicable, that an agency which intends to pursue research, development, or production of a technology developed by a small business concern under an SBIR program enters into follow-on, non-SBIR funding agreements with the small business concern for such research, development, or production.

Finally, § 638(j)(3), directs that not more than 30 days after December 21, 2000, the administrator "shall modify the policy directives issued pursuant to this subsection" to meet various specified objectives.

The only specific requirement that § 638(j)(2)(C) imposes is that the Administrator "modify the policy directives issued pursuant to this subsection to provide for . . . (C) procedures to ensure, to the extent practicable, that an agency which intends to pursue . . . a technology developed by a small business concern under an SBIR program enters into follow-on, non-SBIR funding agreements with the small business concern for such research, development or production." The Administrator has done so. See SBIR Research Program Policy Directive, 67 Fed. Reg. 60,072, 60,075-076 (Sept. 24, 2002) (noting that the special acquisition preference given to SBIR awardees is "a preference and is not mandatory" and that "[i]t is clear that Congress intends, to the greatest extent practicable, that agencies issue Phase III awards to the SBIR awardees that developed the technology"); SBIR Research Program Policy Directive, 58 Fed. Reg. 42,607, 42,612 (Aug. 10, 1993) ("A Federal agency may enter into a third phase agreement with a small business concern for additional work to be performed during or after the second phase period. . . . Agencies which intend to pursue research,

research and development or production of a technology developed by a small business concern under the STTR [Small Business Technology Transfer] Program will give special acquisition preference . . . to the STTR company which developed the technology").

The statutory provision thus deals with modification of "policy directives" to "provide for . . . procedures" to "ensure to the extent practicable" the accomplishment of the statutory policy that Phase III, "follow-on" contracts should be awarded to small business concerns that have successfully completed Phase I and Phase II projects.

Night Vision would interpret this provision as requiring that the objective stated in sub-paragraph (C) be made a mandatory provision of every Phase I and Phase II contract. In effect, it would read into every such contract the requirement that if a contractor successfully completes Phase I and Phase II, the government must adopt Phase III as the way to perform the production phase of the project and award the Phase III contract to the small business concern involved.

Night Vision's, interpretation is not supported by, and is inconsistent with, the language and meaning of § 638(j)(2)(C), which does not impose such a requirement on the government. Indeed, that provision deals with "procedures" to accomplish the stated objective; it does not mandate particular action to achieve those results.

Night Vision's position would seriously limit the government's ability to select the form of procurement that it considers most appropriate in the particular situation. Once the prototypes have been successfully completed in the Phase I and Phase II contracts and the government has determined to go ahead with the acquisition of the prototyped product, it is within the government's discretion to select the particular form the procurement will take. It could be a Phase III contract, which the statute

favors, but does not require, awarded to the small business concern that performed the Phase I and II contracts. It could be a negotiated contact with a particular supplier. Or, as was done in this case, it could be a competitively-let contract. Cf. SBIR Research Program Policy Directive, 67 Fed. Reg. at 60,075 (discussing agencies' alternatives to awarding Phase III contracts and stating that "agencies are required to report only those instances where a follow-on award with non-SBIR funds was issued to a concern other than the SBIR awardee that developed the technology to be pursued under the follow-on reward").

Nothing in § 638(j), however, bars the government from making that choice or requires it to (1) select a Phase III procurement and (2) award the contract therefor to the small business concern that performed the Phase I and II contracts. We decline to read into those contracts such a requirement for, and commitment by, the government. Whatever may be the policy favoring small business in the present situation, there is simply no valid basis for reading such a requirement into the contract.

In sum, § 638 imposes no duty on the government to award a Phase III contract to a concern that successfully completes a Phase II contract. Section 638 creates no rights for any private entities and therefore is not a "regulation . . . intended to define and state the rights of a class of persons." Berg v. United States, 192 Ct. Cl. 176, 183 (1970). The Court of Federal Claims correctly ruled that "nowhere does it [§ 638] impose an obligation directly upon a procuring agency nor does it create any enforceable rights under a SBIR contract." Night Vision, 68 Fed. Cl. at 383.

Indeed, if Night Vision believed it had a contractual commitment from the Air Force to give it a Phase III contract, one would expect it to submit a proposal for such contract - which it did not do.

B. Night Vision contends that, even if there was not a written contract or provision requiring the Air Force to give it the Phase III contract, such an obligation was created by oral promises of Air Force officials that Night Vision would receive such a contract. Although the contracting officer denied that she had so promised, other statements of hers indicate that such promises may have been made. Night Vision also points to deposition testimony by its officers and, by Insight employees, that it received such promises, although the officers and employees did not state by whom or when those promises were made. Night Vision argues that, because of these conflicting views on the factual issue, summary judgment was improper.

The fatal flaw in this argument, as the Court of Federal Claims pointed out, is that Night Vision "failed to produce evidence that a government representative with contracting authority made a contract with plaintiff." Night Vision, 68 Fed. Cl. at 371. Although the contracting officer has broad discretion to execute and amend contracts, administer contractual performance and decide contractual claims, her authority does not include determining the type of procurement to be used for a particular transaction. That is a decision to be made by other officials of the Air Force, who have that authority — in this case apparently by Donald L. Utendorf, the Chief of the Research and Development Contracting office for the Technology Directorates at Wright-Patterson Air Force Base in December 1999. Id. at 376. Not only has Night Vision failed to attribute the alleged oral promises to an official authorized to make them, but much of the evidence upon it which it relies does not even identify the official who allegedly made the promises.

C. Night Vision further contends that even if there was no valid oral contract to award it the Phase III contract, there was an implied-in-fact contract to do so. "An implied-

in-fact contract is one founded upon a meeting of the minds and 'is inferred, as a fact, from the conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding."' Hanlin v. United States, 316 F.3d 1325, 1328 (Fed. Cir. 2003) (citation omitted).

The elements of an implied-in-fact contract are the same as those of an oral express contract. Trauma Serv. Group v. United States, 104 F.3d 1321, 1325 (Fed. Cir.1997). One of the elements Night Vision was required to show was "actual authority on the part of the government's representative to bind the government." Flexfab, L.L.C. v. United States, 424 F.3d 1254, 1265 (Fed. Cir. 2005) (emphasis omitted) (citing Schism v. United States, 316 F.3d 1259, 1278 (Fed. Cir. 2002) (en banc)). The flaw we pointed out in Night Vision's oral contract theory — the failure to show that the Air Force officials who allegedly promised a Phase III contract had the authority to make that commitment — also is fatal to the implied-in-fact contract theory.

D. We are mindful of the strong public policy, reflected in the SBIR program, favoring the awarding of government research and development contracts to small business concerns, as the Small Business Technology Council discusses in its amicus curiae brief. That policy, however, cannot prevail over the fatal defects in Night Vision's case that we have discussed. Night Vision undoubtedly had the hope, and perhaps the expectation, that if it successfully completed the Phase I and Phase II contracts, it would be given a Phase III contract. Unfortunately for Night Vision, however, it did not have such a binding contractual commitment from the Air Force, Since its entire theory in this appeal is that the Air Force breached a contractual commitment, it cannot prevail.

CONCLUSION

The judgment of the Court of Federal Claims dismissing Night Vision's complaint

is

AFFIRMED.

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No.: 0.3-1214C

October 24, 2005

NIGHT VISION CORP.,
Plaintiff,

Summary Judgment; Motion to Dismiss; Small Business Innovative Research ("SBIR") Program; SBIR Data Rights; Implied Contract; Bid Protest

v.

THE UNITED STATES OF AMERICA,

Defendant.

James S. DelSordo, Cohen Mohr, LLP for the plaintiff.

Kyle E. Chadwick, Commercial Litigation Branch, United States Department of Justice, for the defendant.

OPINION AND ORDER

Block, *Judge*.

Ever since Joshua commanded the sun to stop in the sky so that tribes of Israel could have enough light to destroy the Amorites, mankind has sought ways to overcome the

disadvantages the darkness of night pose in warfare.[1] The operations of armies have always been degraded at night, as the darkness presents great difficulty in moving soldiers and identifying the enemy. To fight effectively at night, soldiers traditionally relied on artificial illumination, but this tactic often gave away their tactical position and informed the enemy of their maneuvers.

Today, due to technological advances, the U.S. military no longer relies on artificial illumination, let alone dreams of stopping the sun. In fact, it has almost become cliche to say that the United States military "Owns the Night." The phrase is a boast of the military's near perfect night time operations, which have been achieved in part by technological advances over the last fifty years. The widespread use of one technology in particular – night vision goggles ("NVGs") – has allowed the members of our armed forces to overcome the handicap of darkness and operate effectively at night.

The NVGs we are familiar with from combat footage in Afghanistan and Iraq are electro-optical devices that intensify existing light instead of creating an artificial light source.[2] NVGs first capture ambient fight, such as light from the stars, moon or sky glow from man-made sources. This light is then amplified thousands of times by electronic means and displayed via a phosphor screen. The phosphor screen is purposefully colored green because the human eye can differentiate more shades of green than other phosphor colors. Users thus do not look "through" NVGs, but instead look at an amplified electronic image on a phosphor screen.

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[1] Joshua 10:12-23.

[2] The technical development of night vision goggles is drawn from Night Vision Goggles, http://www.globalsecurity.org/military/systems/ground/nvg.htm.

To maintain its tactical advantage in night fighting capability, the U.S. military constantly seeks to improve existing night vision technology. One area of focus has been in improving the field-of-view of existing NVGs. Historically, the view through NVGs was similar to looking down a tunnel. While a person's natural field-of-view, or peripheral vision, is about 190 degrees, existing NVG technology is limited to roughly 40 degrees of field-of-view. To compensate for this complete absence of peripheral vision, the wearer of NVGs must constantly turn his head, side to side. It was the military's desire to mitigate this problem and widen the field-of-vision in NVGs that led to the parties' dispute before this court.

The plaintiff, Night Vision Corporation ("NVC"), is a small business concern that obtained contracts with the United States Air Force for research and development of wide field-of-view NVG technology NVC successfully developed prototype night vision goggles that expand the field-of view to 100 degrees without compromising image quality — a technology NVC calls "Panoramic Night Vision Goggles" ("PNVG") – under the Small Business Innovative Research ("SBIR") program. The SBIR program requires certain federal agencies to reserve a portion of their research and development budgets for small business concerns. *See* 15 U.S.C. § 638(e)(4) (1996). Generally speaking, fully successful contractors in the SBIR program proceed in three distinct phases. In Phase I, a small business concern is awarded limited funding to determine "the scientific and technical merit and feasibility of ideas that appear to have commercial potential." *Id.* § 638(e)(4)(A). Following the successful completion of Phase I, a Phase II contract maybe awarded, which permits further development of the original idea. *Id.* § 638(e)(4)(B). Phase III envisions a commercial application of the research and development from the prior phases

funded by either "non-Federal sources of capital" or "non-SBIR Federal funding." *Id.* § 638(e)(4)(C).

NVC successfully completed both a Phase I and a Phase II contracts under the SBIR program. Nevertheless, the Air Force eventually decided not to award a SBIR Phase III contract. Instead, the Air Force conducted a competitive procurement, ultimately awarding a contract for additional development of the wide field-of-view night vision goggle concept to Insight Technology, Inc. ("Insight"), which had served as NVC's subcontractor under its Phase II contract.

This competitive award to Insight bitterly disappointed NVC and its principals. NVC felt that, based upon its successful completion of the SBIR Phase I and II contracts, it was entitled to receive a Phase III contract. Indeed, NVC was convinced that Air Force officials had. promised as much while NVC was developing the PNVG prototype. The award to Insight was particularly irksome because NVC and Insight had a troubled relationship as prime and sub-contractors under the Phase II contract.

NVC's conflicts and competition with Insight – and particularly the actions of Air Force employees with respect to these conflicts and competition – form the factual basis of plaintiff's claims. Plaintiff seeks relief on five separate counts. In count I, plaintiff contends that the Air Force breached its SBIR contracts with NVC by disclosing proprietary technical data to Insight in violation of certain regulations. In count II, plaintiff alleges that the Air Force breached a statutory provision allegedly incorporated by law into NVC's SBIR contracts when the Air Force decided not to award NVC an SBIR Phase III contract. In count III, plaintiff claims that the Air Force breached an implied contract with NVC when it decided not to award NVC an SBIR Phase III contract. In count IV, plaintiff claims that the Air Force violated a duty of good faith and fair dealing that it owed to NVC "in all

facets of the procurement process." Finally, count V consists of a bid protest challenging the award of contract no. F33615-00-C-6000 to Insight instead of NVC.

The parties have filed numerous motions, all of which are opposed, regarding each of plaintiff's claims. As will be explained more fully below, the court grants summary judgment to defendant on count I, since plaintiff failed to present evidence that it affixed data rights legends to the goggles, resulting in a waiver of the protection from disclosure plaintiff seeks to invoke here. The court dismisses count II under RCFC 12(b)(6) because the statute plaintiff seeks to incorporate into the contract, 15 U.S.C. § 638(j)(2), imposes no obligation or dutyon either party to the contract. The court grants summary judgment to defendant on count III because plaintiff has failed to produce evidence that a government representative with contracting authority made a contract with plaintiff. The court dismisses count IV under RCFC 12(b)(6) because a key element of this claim must involve a violation of a particular contractual term and the plaintiff's claim assumes there was no contractual obligation to award the Phase III contract. Finally, the court grants defendant's motion for judgment on the administrative record on count V because plaintiff has failed to prove the defendant's evaluation of the bids were arbitrary, capricious, or an abuse an discretion, a threshold issue in a bid protest.

I. Factual Background[3]

NVC, whose founder and president is Danny Filiopovich, designs "optical image intensification systems" for night vision goggles, which "enable the wearer to see in low-light and no fight conditions." D. Resp. PFUF ¶¶1-2, 4; P1.Resp. PFUF ¶7; Pl. App. Ex. A, ¶2, 4. On May 12, 1995, the Air Force awarded NVC a SBIR Phase I contract under which NVC developed a single prototype of its PNVG design.[4] Pl. Resp. PFUF ¶1; D. Resp. PFUF ¶21.

On July 12, 1996, the Air Force awarded NVC a SBIR Phase II contract under which NVC arranged for the production of twelve developmental night vision goggle prototypes with the help of a subcontractor.[5] Pl. Resp. PFUF ¶3. Seven of these prototypes were in a configuration called PNVG I[6] and five were in a configuration called

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[3] These facts are derived from the following sources: (1) the appendix to plaintiff's motion for summary judgment ("Pl. App."); (2) the appendix to defendant's cross-motion for summary judgment ("D. App."); (3) plaintiff's response to defendant's proposed findings of uncontroverted fact ("Pl. Resp. PFUF"); (4) defendant's response to plaintiff's proposed findings of uncontroverted fact ("D. Resp. PFUF"); (5) defendant's supplemental appendix ("D. Supp. App."); (6) plaintiff's counter-statement of facts for count V ("Pl. CSF"); and (7) the parties' pleadings, motions, and supporting memoranda.

[4] The Air Force awarded NVC Contract No. F41624-95-C-6004 on May 12, 1995. D. App. Ex. 1.

[5] The Air Force awarded NVC Contract No. F41624-96-C-6005 on July 12, 1996. D. App. Ex. 2

[6] The PNVG I configuration was apparently designed for use by pilots of fixed-wing aircraft. NVC contends that the PNVG I was safer for a pilot to wear during ejection from aircraft than earlier systems. D. Resp. PFUF ¶ 79; Pl. App. Ex. A ¶18.

PNVG II.[7] Pl. Resp. PFUF ¶5. Both configurations expanded the field-of-vision provided by existing night vision goggle technologies while maintaining, similar image resolutions.[8] Pl. App. Ex. 13 at 365.

The Air Force Research Laboratory ("AFRL") at Wright-Patterson Air Force Base administered NVC's SBIR contracts. Pl. Resp. PFUF at ¶2. NVC worked with several AFRL employees, including: Jeffrey Craig, an engineer and night vision technology specialist; Randy Brown, an AFRL program manager, Dr. H. Lee Task, the senior scientist advisor for NVC's SBIR contracts; and two contracting officers, Judith Demos, who served as the contracting officer throughout most of NVC's performance of its SBIR contracts, and Mary Jones, who succeeded Ms. Demos late in the process. Pl. Resp. PFUF at ¶¶ 2, 4; D. Resp. PFUF at ¶ 37.

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[7] The PNVG II configuration, which was intended for use by helicopter pilots, "was to be a less expensive, less sophisticated version of the PNVG I system," according to Mr. Filipoovich. Pl. App. Ex. A., ¶31.

[8] As alluded to in the introduction, prior night vision goggle technologies, which incorporated two optical channels (like a pair of binoculars) generally provided a circular 40 degree field-of-vision. Pl. App. Ex. 13 at 366. Field-of-vision in these earlier systems could only be increased at the expense of image resolution, because each optical channel incorporated a single image intensifier tube with a limited number of pixels. *Id.* If this limited number of pixels are "spread over a larger [field-of-vision], the angular substense per pixel increases proportionally," which results in reduced resolution. D. App. 45. Incorporating four optical channels (and thus four image intensifier tubes), NYC's PNVG goggles were designed to maintain resolution while increasing the field-of-vision to 100 degrees horizontal and 40 degrees vertical, an increase of 160 percent. D. App. 44.

Sometime after July 1996, Insight agreed to serve as NVC's primary subcontractor under the SBIR Phase II contract. D. Resp. PFUF ¶ 23-25. Insight was founded in 1987 by a former Army employee named Kenneth Solinsky, who currently serves as the company's president. D. Resp. PFUF ¶ 25; Pl. App. Ex. L at 5. Among other things, this subcontract (hereinafter "Phase II subcontract") required Insight to "assist in the design and manufacture of the plastic housings and bridge assembly for the PNVG I units," convert NVC's design "into engineering drawings suitable for manufacture," and "fabricate and assemble the goggle assembly." D. Resp. PFUF ¶23; Pl App: Ex. A ¶ 27. Unfortunately, the record reveals that NVC and Insight did not work well together, and the two companies maintained a tenuous relationship.

Long before NVC completed performance of its Phase II contract, the Air Force considered the possibility of awarding NVC an SBIR Phase III contract. For instance, in early 1997, Mr. Filipovich stated that Air Force personnel instructed him to prepare NVC for performance of an SBIR Phase III contract. In particular, Air Force personnel indicated that because NVC lacked any production capability it needed to either "develop the production capability that would be required for production in a SBIR Phase III, or subcontract with a company capable of producing the PNVG system." Pl. App. Ex. A ¶ 20.

It was the potential work under a future SBIR Phase III contract that was grist for much of the dispute between Insight and NVC. In April 1998, Mr. Solinsky demanded that Insight "be granted exclusive manufacturing rights" for any SBIR Phase III contract, and threatened to stop work under the Phase II subcontract (thus threatening NVC's ability to perform) until Insight received this guarantee. D. Resp. PFUF ¶ 41.

Although it initially resisted, NVC sent a letter to Insight on May 8, 1998 promising that "during . . . Phase III, [Insight] will be the exclusive manufacturer for both the PNVG I and PNVG II." PI. App. Ex. 64; Pl. App: Ex. D, ¶ 3. After obtaining this promise, Mr. Solinsky sought a further guarantee that Insight would have a role in production beyond Phase III. D. Resp. PFUF ¶49. Contemporaneous with this demand, Insight stopped work and also withheld from NVC a set of drawings that it was required to deliver to NVC under the Phase II subcontract. Pl App. Ex. H at 208-10, 213-14; Pl. App. Ex. J at 174-75, 213-16.

By July 1998, the disputes between NVC and Insight threatened completion of the Phase II contract. On July 8,1998, in an attempt to resolve the conflicts between NVC and Insight, Air Force personnel met with representatives of the two companies. Pl. App. Ex. H at 210,-14. At this meeting, Mr. Solinsky renewed both his demand for a guarantee that Insight would be NVC's exclusive manufacturer beyond any SBIR Phase III contract and his threat that until it received this guarantee, Insight would not perform under the Phase 11 subcontract. D. Resp. PFUF ¶ 56; Pl. App. Ex. J at 226-27. The parties at the meeting discussed and drafted a teaming agreement to be executed by NVC and Insight. D. Resp. PFUF ¶¶ 57-8, 63-4; Pl. App. Ex. J at 229-45. The next day, NVC and Insight executed this agreement, which (among other things) guaranteed that if the Phase II contract led to a Phase III contract, Insight would be NVC's manufacture; the teaming agreement also protected Insight's proprietary data from disclosure to third parties. Pl. App. Ex. 91; D. Resp. PFUF ¶ 64.

Throughout the rest of 1998, the Air Force and NVC continued to discuss the possibility of work under an SBIR Phase III contract. For instance, on December 15-16, 1998, Air Force personnel, met with NVC to discuss "acquisition

strategy" related to the PNVG program. Pl. Reply Pl. Mot. Summ. J. Ex. A, ¶ 26. At that time, Air Force employees discussed with NVC how the development and production of NVC's night vision goggle technology would proceed under an SBIR Phase III contract. Pl. Reply Pl. Mot. Summ. J. Ex. A, ¶¶ 24-27.

It appears that by the Spring of 1999, however, the Air Force was considering alternatives to awarding NVC an SBIR Phase III contract. In April 1999, Mr. Brown apparently asked Insight for quotes for the manufacture of 500 PNVG I and 1,000 PNVG II units. Pl. App. Ex. 153. In an email dated April 19, 1999, Mr. Solinsky responded with the requested quotes; an email exchange elaborating on these quotes between Solinsky and Mr. Brown followed. *Id.*

As the completion of the SBIR Phase II approached, all of the parties' focus turned more to determining how the development of the PNVG would proceed. On June 24, 1999, Mr. Filipovich took part in a conference call with Air Force employees, including Mr. Brown, Mr. Craig, Dr. Task, and Mr. Kocian, regarding the possibility of an SBIR Phase III contract. Pl. App. Ex. A ¶ 63. According to Mr. Filipovich, Mr. Brown told him that "the Air Force did not want to offer Phase III to NVC, but, instead, wanted NVC to sell its technology to Insight and become a consultant to Insight." *Id.* Mr. Filipovich also stated that Mr. Kocian told him: "[y]our only option is to sell [your technology] to Insight. Otherwise, you will never get another contract from the Air Force." *Id.* at ¶ 65. Further, Mr. Filipovich claims that Mr. Brown and Dr. Task confirmed that "NVC has no option but to sell NVC or its technology to Insight." *Id.* at ¶ 66. Mr. Brown's notes related to this call indicate that the Air Force "probably would not pursue" awarding the SBIR Phase III contract to NVC and that awarding the SBIR Phase III contract to Insight as the prime contractor

with NVC as a subcontractor was the "preferred approach." PL App. Ex. 745.

Mr. Filipovich sent a letter the next day to Mr. Brown and Mr. Craig, summarizing his understanding of what he had been told in the previous day's phone call. Pl. App. Ex. 191. Mr. Filipovich wrote he had been told the Air Force would not offer NVC a SBIR Phase III contract. *Id.* Moreover, Mr. Filipovich wrote, he was told that NVC should not submit -- and the Air Force would not accept -- a SBIR Phase III contract proposal from NVC. *Id.* Mr. Filipovich also wrote that he had been encouraged to sell the PNVG program and the related technology to Insight, who would then serve as the prime contractor. *Id.*

On June 28, 1999, the Air Force officially announced that it was considering a competitive procurement instead of issuing a SBIR Phase III contract to NVC. Pl. App. Ex. 192. On that date the Air Force published a notice entitled "Potential Sources Sought," seeking possible developers of a "night vision goggle" offering "a wider field of view (at least 100 degree horizontal by 40 vertical . . .) and high resolution." *Id.* This document publicized that the Air Force would seek to develop two versions of the goggles. *Id.* The related descriptions in the document seem to correspond with NVC's PNVG I and PNVG II configurations. *Id*

At this time, Insight was preparing to compete directly against NVC for a contract to develop the PNVG system. On July 1, 1999, Insight executed an agreement with ITT Industries, Inc. ("ITT") to work together towards obtaining a PNVG competitive procurement contract. Pl. App. Ex. 198. ITT was another indispensable subcontractor to NVC under its SBIR contracts, supplying the "image intensifier tubes" for the PNVG system. Pl. App. Ex. A ¶ 32.

On July 7, 1999, representatives from Insight and ITT met with Air Force personnel to present a sales pitch they

called "PNVG: Road to Production." D. Resp. PFUF ¶ 96; Pl. App. Ex. 203. Among other things, this presentation addressed potential legal issues related to the Air Force's decision to proceed with a competitive procurement instead of awarding NVC a SBIR Phase III contract Pl. App. Ex. 203 at DE000967-73. Specifically, Insight and ITT claimed that pursuant to 48 C.F.R. § 252.227-7018 Insight and ITT enjoyed some data rights related to the PNVG program as subcontractors to NVC. *Id.* at DE000970-72. Still, Insight and ITT's presentation ultimately recommended that the "Government should acquire unlimited data rights and provide [those rights] to all competitors." *Id.* at DE000972.

On July 13, 1999, the Air Force sent a letter to NVC directing it to incorporate into its subcontracts 48 C.F.R. § 52.227-11, a provision regarding data rights protections afforded to subcontractors of federal government contracts. Pl. App. Ex. 204. On July 14, 1999, the Air Force sent another letter to NVC announcing its intention to pursue development of the PNVG through a competitive procurement. Pl. App. Ex. 205. This letter also stated that the Air Force would like to obtain "government purpose rights" to NVC's proprietary data. *Id.*

Later that month, it appears that Insight and ITT began actual work on a night vison goggle system that would compete with NVC's PNVG. PL App. Ex. 218, 219. Based on this preliminary work on or about July 22, 1999, personnel from the Army Night Vision Laboratory requested a cost estimate for the development of up to 20,000 PNVG. Pl. App. Ex. 206.

On July 30, 1999, Insight delivered to NVC the drawings it was required to generate under the SBIR Phase II subcontract. D. Resp. PFUF ¶ 111. The same day, NVC delivered the final data package for its SBIR Phase II contract to the Air Force which included both technical

information (such as drawing and schematics) and prototypes of the goggles. PI. App. Ex. A, ¶ 70. NVC claims that it marked all technical data that it delivered to the Air Force with data rights legends indicating that the data was proprietary. D. Resp. PFUF ¶ 111; Pl. App. Ex. 236. Nonetheless, it is uncontroverted that NVC did *not* affix such legends to the actual goggles that it delivered to the Air Force along with the technical documents (a significant factor discussed at length below).

As a contract monitor under NVC's SBIR Phase II contract, Mr. Craig received the goggles that NVC delivered to the Air Force under the contract. D. App. 153. Mr. Craig stated that none of these goggles were marked with a restrictive data rights legend, nor were they accompanied by a transmittal document or storage container bearing any such restrictive data rights legend. *Id.* Mr. Craig stated his belief that all the goggles were marked "patent pending." *Id.*

With the delivery of the final data package, NVC's SBIR Phase II performance was complete. Pl. App. Ex. A ¶ 70. According to Plaintiff, NVC "fully and satisfactorily performed all of its obligations" under both its SBIR Phase I and Phase II contracts. Pl. Reply Pl. Mot. Summ. J. Ex. A ¶¶ 13-14. Also, the results that NVC obtained under both of its SBIR contracts "met the the Air Force's expectations." *Id.* at ¶¶ 15, 17.

Despite the successful completion of the SBIR Phase ll contract, the Air Force remained reluctant to award NVC a Phase III contract. This was apparent from a meeting of Air Force personnel on August 23, 1999. Materials from a presentation given in that meeting stated that the Air Force "did not see any value in NVC conducting a Phase III." Pl. App. Ex. 264. This presentation was concluded with the following text: "Recommendation: Acquire Government Purpose Data Rights to PNVG Phase 2 data.

Conduct full and open competition for PNVG follow-on contract. Provide PNVG data as a baseline for design." *Id.* Plaintiff has produced typed notes by an unidentified author, apparently related to this meeting, that contains the words: "Laboratory does not want to award to NVC." Pl. App. Ex. 270. Concerning a NVC SBIR Phase III proposal, the notes indicate that the Air Force would "allow NVC to submit," and "if acceptable, award to NVC, if not acceptable, do one of two things, pursue purchase of data rights from NVC or issue a [Program Research and Development Announcement] for the technology." *Id.*

On August 27,1999, Air Force and NVC representatives met at Wright-Patterson Air Force Base. At that meeting, Ms. Jones stated that the Air Force was considering either "issuing a Phase III or pursuing full and open competition." D. Resp. PFUF ¶ 128; Pl. App. Ex. 275, NV11770. Mr. Filipovich asked if the Air Force would consider evaluating a SBIR Phase III proposal from NVC. PI. App. Ex. 275 at NV11770. According to a file memorandum regarding the meeting, Ms. Jones replied that "should [NVC] choose to submit a Phase III proposal the government would evaluate it." *Id.* at NV11774. Ms. Jones also explained that the Air Force would not request such a proposal or guarantee an award. *Id.* When Mr. Filipovich replied that NVC would not want to submit a proposal if a SBIR Phase III contract was not a valid option, Ms. Jones stated that " the government cannot guarantee that we will award a Phase III contract just because a Phase Ill proposal is submitted." *Id.* Similarly, according to Dr. Task, Mr. Filipovich asked if "he would be guaranteed of getting the contract" if he submitted a Phase III proposal. D. App. 126. Dr. Task responded that "there is no guarantee to getting a [Phase Ill] until after we see the proposal and can evaluate [it]." *Id.* It is important to note that NVC did not submit a proposal for a SBIR Phase III conduct D. App. 111; Pl. Resp. PFUF ¶ 9.

Notes from that meeting, apparently written by Ms. Jones, under the heading "NVC's purpose, "state: "'Sob Story' company is going under and it is the Government's fault because NVC (I think) has been promised a Phase III somewhere along the way. Now the Government is telling NVC we are not sure if that is in the strategy." Regarding another Air Force employee's reaction to the meeting, Ms. Jones wrote: "She got the same feeling I did from the meeting and that is she thinks we have promised NVC a Phase III proposal somewhere along the way." Pl. App. Ex. 277.

During this time the Air Force remained to be in communication with Insight about work on the PNVG system. Several times in August and September 1999, the Air Force mailed to Insight PNVG prototypes that NVC had delivered under the SBIR Phase II contract. D. Resp. PFUF ¶114 -15; Pl. Reply Pl. Mot. Summ. J: Ex. A, ¶ 3-6. Insight apparently retained some of these PNVG units for several days or weeks while shipping other units back to the Air Force only a few days after receiving them.[9] D. Resp. PFUF ¶114-15; Pl. Reply Pl. Mot. Summ. J. Ex. A, ¶ 3-6. A photograph of a disassembled PNVG II unit was among the materials Insight produced in discovery in its litigation with NVC in the Eastern District of Virginia. D. Rasp. PFUF ¶132; Pl. App. Ex. 702. Still, Mr. Solinsky denied that Insight disassembled the PNVG prototypes that the Air Force sent to him: Pl. App. Ex. L at 268.

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[9] On December 8, 1999, George W. Bush, then a candidate for the presidency, visited Insight and posed for photographs holding prototypes of the goggles designed by NVC under its Phase II SBIR contract. D. Resp. PFUF T 151; Pl. App. Ex. 371, 373. As before, the Air Force (Mssr. Craig and Brown) had sent the PNVG prototypes that appear in this photograph to Insight. D. Resp. PFUF ¶151; Pl. App. Ex. 371, 373.

However, Mr. Solinsky acknowledged that Insight took measurements of the PNVG prototypes.[10] *Id.*

Additionally, on September 10, 1999, Mr. Craig reported results of flight tests conducted with the NVC's prototype PNVG to Insight. D. Resp. PFUF ¶133. According to NVC, it was not informed of this conversation. *Id.* On September 17, 1999, an Insight employee set up a meeting with Mr. Craig to discuss technical issues. *Id* at ¶138.

On September 29, 1999, Mr. Brown sent an e-mail to other Air Force personnel stating that the Air Force had requested NVC to declare its "intentions on submitting a Phase III proposal." D. Resp. PFUF ¶ 140; Pl. App. Ex. 316. This e-mail also stated that the Air Force was "proceeding very cautiously" and was "not willing to commit to pursuing full and open competition at this time." D. Resp. PFUF ¶ 140; Pl. App. Ex. 316.

On October 7, 1999, Air Force, Insight, and NVC representatives met to discuss the unobligated plus-up funds and the possibility of working together under a SBIR Phase III contract. D. Resp. PFUF ¶ 141; P.. App. Ex. 322. Specifically, Mr. Brown and Mr. Craig acknowledged that the Air Force needed to use the unobligated funds, or else it would lose them. D. Resp. PFUF ¶ 143.

On October 18,1999, Mr. Filipovich wrote a letter to the Air Force arguing that NVC should be awarded a sole source, SBIR Phase III contract. Pl. Resp. PFUF ¶ 7. Mr. Filipovich did not claim in that letter that the Air Force

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[10] During this time, Insight was not under contract with the Air Force to maintain or repair the PNVG systems. On the contrary, Insight declined an opportunity to perform maintenance on the PNVG systems. D. Resp. PFUF ¶ 113; Pl. Reply. Pl. Mot. Summ. J. Ex. A, ¶ 2; Pl. App. Ex. 711.

had previously agreed to award it a SBIR Phase III contract. *Id.*

On October 21, 1999, Mr. Solinsky wrote a letter to Ms. Jones requesting a meeting with the Air Force to discuss the PNVG program and make a presentation regarding work Insight and ITT had done since June 29, 1999. D. Resp. PFUF ¶ 146

By November 1999, the Air Force appears to have been leaning toward its ultimate decision against awarding NVC a Phase III contract. On November 3, 1999, Mr. Craig and Mr. Brown prepared a document entitled "Integrated Panoramic Night Vision Goggle: Information Brief." D. Resp. PFUF ¶ 147; Pl. App. Ex. 348. The Information Brief listed two options for future contracts: (a) full and open competition in which NVC and Insight would compete; and (b) a SBIR Phase III contract with NVC. Pl. App. Ex. 348, AF200962. This document also gave several factors that weighed against pursuing a SBIR Phase III contract with NVC:

- [NVC] is a very small company; limited capability to manage next phase"
- "Limited innovative solutions"
- "No incentive to control costs"
- "Limited data rights"
- "'Phase II subcontractors on NVC proposed team are unwilling to participate"
- "Bottom Line: there is no longer a team for a SBIR Phase III award."

Id. AF200963. The Information Brief s recommendation was that the Air Force pursue full and open competition. *Id.*

The Air Force's inclination against awarding NVC a Phase III contract continued throughout November. The Air Force Chief of Staff noted on or before November 9, 1999, that the Air Force would compete the PNVG Phase III program. Pl. App. Ex. 354. Likewise, on November 17, 1999, the Secretary of the Air Force in a letter indicated that the Air Force "plan[ned] to hold a full and open competition to finish the PNVG development." D. Resp. PFUF ¶ 149.

The Air Force made its final decision against awarding NVC a SBIR Phase III contract in December 1999. An Air Force "Acquisition Strategy Panel" met on December 1, 1999 to discuss the Air Force's plan for future development of the PNVG program. Pl. App. Ex. 364, 365, 366. The Acquisition Strategy Panel reviewed factors for and against pursuing either full and open competition or a SBIR Phase III contract with NVC. Pl. App. Ex. 365 at AF103267-68.

The panel specifically cited the reasons against pursuing a SBIR Phase III with NVC that were listed in the November 3, 1999, Information Brief. *Id.* at AF103268. The panel also noted that "[NVC] had difficulty in managing the Phase II contract which is less of a management challenge than a new Phase III contract would be." *Id.* The panel ultimately recommended that the Air Force procure further PNVG development through full and open competition using the Program Research & Development Announcement ("PRDA") procedure. *Id.* at AF103266-68, AF103277.

On December 10, 1999, Donald L. Utendorf, then Chief of the Research and Development Contracting Office for the Technology Directorates at Wright-Patterson Air Force Base, decided that the Air Force would issue the PRDA instead of awarding a SBIR Phase III contract to NVC. D. App. 159-61. In reaching this conclusion, Mr.

Utendorf adopted the recommendation of Maris Vikmanis, an AFRL technical management leader, and the AFRL Acquisition Strategy Panel. D. App. 160.

On December 16, 1999, the AFRL, in conjunction with the United States Army Night Vision and Electronic Sensors Directorate, posted Program Research and Development Announcement ("PRDA") No. 00-01-HE. Pl. CSF ¶ 1; D. Resp. PFUF ¶ 150. The purpose of the PRDA was "to award a negotiated, 24-month Advanced Technology Demonstration ("ATD") contract" for what the Air Force called Integrated Panoramic Night Vision Goggles ("IPNVG"). Pl. CSF ¶ 1.

On January 7, 2000, Mr. Filipovich sent a letter to Ms. Jones, expressing concern about protecting NVC's SBIR data rights in connection with the PRDA. *Id.* at ¶ 6. Mr. Filipovich's letter stated, among other things, that "[o]nly those designs that are developed independently and without reliance on NVC's proprietary design concepts should be accepted by the Government." *Id.*

In January 2000, Litton Systems, Inc. ("Litton') requested that the Air Force permit it to borrow a PNVG unit for two weeks – or at least examine a PNVG unit at an Air Force facility. *Id.* at ¶ 7. In a letter dated January 28, 2000, Ms. Jones informed Litton and other potential bidders that they could examine one PNVG unit at Wright-Patterson Air Force Base for up to three hours. *Id.* During this examination, Ms. Jones informed the potential bidders, "[d)isassembly of the PNVG will not be allowed." *Id.* Moreover, Ms. Jones emphasized that the "Air Force is not looking for a copy of the PNVG as designed under the previous [SBIR].contracts[,] which is why we have elected to issue a [PRDA, which] encourages industry to propose new and creative solutions." *Id.*

On January 31, 2000, Mr. Filipovich sent an email to Ms. Jones stating that allowing other potential bidders to

inspect a PNVG was "a violation of NVC's SBIR DATA RIGHTS." *Id.* at ¶ 8. James David Box, an Air Force contracting officer, responded to this email in a letter dated February 2, 2000. *Id.* at 19. Mr. Box stated: "After much research and consideration, I am convinced that allowing limited inspection of the PNVG goggle does not violate NVC's SBIR data rights nor patent, rights." *Id.* Mr. Box also added: "Please be assured that the Air Force's goal is to strive for new and creative solutions to the PNVG, and not merely to reproduce the goggles made by NVC under the SBIR program. This is why we have limited the inspection to a 3 hour period . . . and prohibited the disassembly of the goggle." *Id.*

Three companies submitted bids in response to the PRDA: NVC, Insight, and Litton. *Id.* at ¶ 10. On March 22, 2000, following technical evaluations of the proposals, the evaluation team ranked Insight first, based upon technical merit, followed by Litton. NVC's proposal was ranked as "Category III" and ineligible for award, because it did not meet agency needs. *Id.*

The technical evaluation team's summary of comments regarding NVC's bid concluded that "[t]he majority of the program team has not been identified and there is no supporting documentation from any of the subcontractors, showing cost or commitment to perform. Therefore, NVC's proposal does not meet agency needs." *Id* at ¶ 11.

The technical evaluators' overall summary with respect to Insight was much more favorable: "Insight addresses all of the important aspects of their approach for developing a well conceived Integrated PNVG/ANVG. They provided detailed information of the design approach they plan to pursue and this made it easier to address the amount of risk associated with their effort." *Id.* ¶ 12.

The Air Force entered into negotiations with Insight on April 3, 2000 and awarded Insight contract number F33615-00-C-6000 on April 7, 2000. Pl. CSF ¶ 13.

II. Jurisdiction and Standard of Review

This court has jurisdiction over plaintiff's express contract, implied contract, and bid protest claims under the Tucker Act, which confers jurisdiction on this court for claims against the United States founded on "an express or implied contract" and for"action[s] by an interested party objecting to . . . the award of a contract" by a federal agency. 28 U.S.C. § 1491(a)(1), (b)(1); *United States v. Testan*, 424 U.S. 392, 397 (1976).

The standards this court must follow in deciding summary judgment motions and motions to dismiss for failure of the pleading to state a claim are quite clear. As to grant summary judgment, this court may only grant summary judgment when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. RCFC 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In its summary judgment inquiry, the court must carefully scrutinize the proffered facts to determine exactly what is at issue, but it is important to also note that this does not mean that all contradictions of fact are fatal. *Anderson*, 477 U.S. at 247. In this inquiry, "factual disputes that are irrelevant or unnecessary *will* not be counted." *Id.* Summary judgment can still be granted where the disagreement is tangential to the case; that is, the factual dispute is not "material" because it would not make a difference in the result of the case under the governing law." *Id.*

It is now well-accepted that a moving party is not required to produce evidence showing an absence of

genuine material fact. *Celotex Corp. v. Citrate,* 477 U.S. 317, 325 (1985). A moving party need only point to an absence of evidence for a required element of the nonmoving party's case. *Id.* Moving parties may succeed, therefore, whether or not they rely "on the pleadings, depositions, answers to interrogatories and admissions on file." *Id.* at 324. Even so, when a moving party properly identifies an absence of evidence in the nonmoving party's case, the burden then shifts to the nonmoving party to make a showing sufficient to establish that element or create an issue of material fact. *Id.* at 322. It is critical to note that the nonmoving party may not rely on conclusory statements or assertions. *Id.* at 324. Once the burden shifts, the nonmoving party must go beyond its own pleadings and identify specific facts in the record that show that there is a genuine issue as to material fact for trial. *Id.* If it does not, summary judgment must be rendered in favor of the moving party. *Id.*

On cross-motions for summary judgment (as the parties have here filed regarding plaintiff's data rights claim), the standard is somewhat different, bowing to common sense. For instance, the court may not assume there are no genuine issues as to material fact. *Princeville Sawmill Co. v. United* States, 859 F.2d 905, 911 (Fed. Cir. 1988) (citing Mingus Contructors, Inc. v. United States), 812 F.2d 1387, 1391 (Fed. Cir. 1987)). Yet, the court must still evaluate each party's motion on its own merits, remembering to make all reasonable inferences against the party whose motion is being considered. *DeMarini Sports, Inc. v. Worth, Inc.*, 239 F.3d 1314, 1322 (Fed. Cir. 2001).

As for the standard the court must follow in deciding motions to dismiss for failure of the pleading to state a claim pursuant to RCFC 12(b)(6), and unlike summary judgment, only a "facial" challenge to the legal sufficiency of the complaint is examined. In other words, granting

this motion must solely be "based on the facts alleged in the complaint when "the law countenances no remedy." *Client Network Servs., Inc. v. United States*, 64 Fed. Cl. 784, 789 (2005); *see, e g., Perez v. United States*, 156 F.3d 1366, 1370 (Fed. Cir.1998). In its 12(b)(6) inquiry, the court accepts all well-pleaded facts as true and draws all reasonable inferences in favor of the plaintiff. *Id.* Additionally, Rule 12(b)(6) requires the court to treat the motion as one for summary judgment if matters outside the plaintiffs pleading are presented.[11] *See Advanced Cardiovascular Sys. Inc. v. Scimed Life Sys., Inc.* 988 F.2d 1157,1164 (Fed, Cit. 1993). Thus, the granting of dismissal is only proper when plaintiff can "prove no set of facts" that would entitle it to legal relief. *Southfork Sys. v. United States*, 141 F.3d 1124, 1131 (Fed. Cir. 1998).

III. Discussion

Risking a bit of redundancy for the ease of reading, the court restates the grounds of plaintiffs complaint. It consists of five claims for relief, each to be addressed in turn. Count I alleges that defendant breached the SBIR contracts with plaintiff by disclosing proprietary, technical

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[11] RCFC 12(c) provides in part that:

> on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

RCFC 12(c).

data to Insight. Count II alleges that defendant breached a provision allegedly incorporated by law into the SBIR contracts with-plaintiff which required defendant to award plaintiff a SBIR Phase III contract. Count III alleges defendant breached an oral contract with plaintiff by not awarding plaintiffs SBIR Phase III contract. Count IV alleges defendant violated a duty of good faith and fair dealing owed to plaintiff throughout the procurement process. Finally, count V consists of a bid protest challenging the award of contract no. F33615-00-C-6000 to Insight instead of NVG.

A. Did Defendant Breach Plaintiff's SBIR Data Rights?

The parties have filed cross-motions for summary judgment on count I, in which plaintiff claims that defendant violated a prohibition against disclosing plaintiff's proprietary data when defendant sent PNVG prototypes to Insight.[12] Pl. Mot. Summ. J. 30-33; D. Mot. Summ. J. 6-11. Plaintiff argues that PNVG prototype units themselves constitute proprietary "technical data"[13] and are entitled to

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[12] The complaint also alleged that defendant disclosed "other proprietary data," but plaintiff has abandoned that claim. *See* Pl. Mem Opp'n Summ. J. 3, n. 1.

[13] A variety of terms in the regulations governing the protection of SBIR data rights are often used interchangeably. In the interest of clarity, the definition of those terms are:

- "Data": "recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software." 48 C.F.R. § 52.227-20(a).
- "SBIR data": "data first produced by a Contractor that is a small business firm in performance of a small business innovation research contract ..." 48 C.F.R. § 52.227-20(a).

(continued...)

protection from government disclosure under 48 C.F.R. § 252.227-7018 (2005). Pl. Mot. Summ. J. 30-33. Defendant argues that plaintiff waived any legal protection from disclosure of data rights since the plaintiff delivered the goggles to defendant without protective markings that are required by the regulation as a condition to the protection it offers. D. Mot. Summ. J. 6-11. Defendant further argues that the legal protection plaintiff seeks does not apply to the actual goggle prototypes, since tangible products delivered under a SBIR contract are not "technical data." *Id.* The court essentially concurs with defendant.

Since the material facts are not disputed by the parties, the issues this court must determine for summary judgment are pure questions of law. *Terlep v. Brinkmann Corp.*, 418 F.3d 1379, 1381 (Fed. Cir. 2005); *Dana Corp. v. United States*, 174 F.3d 1344, 1347 (Fed. Cir. 1999) (summary judgment appropriate because no material facts were disputed and the only disputed issues were issues of law). In particular, the court must first decide if the absence of a SBIR data rights legend on items delivered to the government constitutes a waiver of any regulatory protections that might otherwise limit disclosure. Because the legal issue of whether a physical prototype in-and-of-itself can constitute "technical data" appears to be one of first impression, it is appropriate for the court to first determine the waiver issue. *See Ashwander v Tennessee Valley Auth*, 297 U.S. 288, 324 (1936) ("The judicial power does not extend to the determination of abstract questions."). Only if the absence of the legend does not consti-

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[13] (...continued)

• "Technical data": "recorded information, regardless of the form or method of the recording, of a scientific or technical nature . . . " 48 C.F.R. § 252.227-7018(a)(19).

tute a waiver of regulatory protections would the court then need-to reach the underlying definition issue.

The parties' SBIR Phase II contract incorporates by reference 48 C.F.R. § 252.227-7018, the SBIR limited data rights provision. D. App. 33. This provision generally prohibits the government from releasing or disclosing "SBIR data to any person other than its support service contractors." 48 C.F.R. § 252.227-7018(b)(4)(ii). On its face, this regulation would prohibit defendants from leasing protected "data" to Insight. Nevertheless, this same provision requires that a contractor clearly mark data with a prescribed legend that the contractor wishes to protect from disclosure. Id § 252.227-7018(f). In particular, the FAR provides: "The Contractor . . . may only assert restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data . . . to be delivered under this contract by marking the deliverable data . . . subject to restriction." *Id.* Contractors must use the legend provided in the same provision to preserve the protection of their data from disclosure. *See Id.* The SBIR data rights legend prescribed by the FAR requires the contractor to list information such as the contract name and number and the expiration date of the SBIR data rights period. The legend must also include the following language: "The Govemment's rights to use, modify, reproduce, release, perform, display, or disclose technical data . . . marked with this legend are restricted during the period shown . . . No restrictions apply after the expiration date shown above." *Id.* § 252.227-7018(f)(4).

By its own language, § 252.227-7018(f) indicates that a contractor may only restrict the government's use and disclosure of technical data by marking the deliverable data with the appropriate data legend. A failure to use the appropriate legend results in the government receiving complete, unrestricted use. Other sections of the FAR

which limit the government's rights in proprietary data developed by contractors have consistently been interpreted in this vein. *See Ervin & Assocs., Inc. v. United States*, 59 Fed. Cl. 267 (2004) (notwithstanding contractor's "oral statements, letters, and e-mails" allegedly asserting protection of proprietary data, the contractor's failure to mark data with the "Limited Rights Notice" prescribed in 48 C.F.R. § 52.227-14 resulted in government obtaining unlimited data rights); *Gen. Atronics* Corp., ASBCA No. 49196, 2002 WL 450441(Mar.19, 2002); E.M. Scott & Assoc., ASBCA No. 45,869, 94-3 BCA ¶ 27,059,1994 WL 409331 (July 28, 1994) (contractor's failure to use the restrictive legend of 48 C.F.R. § 52.215-12 gave government unrestricted rights to data); *Bell Helicopter Textron*, ASBCA No. 21,192 85-3 BCA ¶ 18,415,1985 WL 17050 (Sept. 23,1985) (contractor's failure to mark technical engineering drawings with a restrictive legend required by a contract clause similar to 48 C.F.R. §252.227-7013 resulted in the government receiving unlimited rights to the data conveyed by the drawings).

The court finds persuasive the reasoning of the Armed Services Board of Contract Appeals ("ASBCA') in *Genral Atronics Corp.* There the Navy requested that a contractor include proprietary computer software along with technical hardware called for in the contract. The contractor argued that the Navy's use of the software should be restricted and brought a claim for software licensing fees to cover the Navy's additional use of the software. The ASBCA noted that the contract incorporated 48 C.F.R. § 252.227-7013, which covers rights in technical data and requires a legend to be placed on all data to restrict the governments use. The ASBCA pointed out that the contractor delivered the software to the Navy without the restricted rights legend required by § 252.227-7013. The ASBCA also found immaterial the fact the contractor had delivered technical manuals for the hardware with an appropriate restricted

right legend, since those manuals had not specifically made any assertions regarding the software. As a result, the ASBCA concluded that the Navy had acquired unlimited rights to the software and denied the contractor's claim.

As in *General Atronics Corp.*, it is undisputed that neither the prototypes that plaintiff delivered to defendant nor the packaging in which those prototypes arrived were marked with proprietary data legends. D. App. 153. This failure to use an appropriate data legend gave the government unrestricted use to the PNVG prototypes. Plaintiff's argument that it was sufficient to have affixed the legend to the "technical drawings and documentation" associated with the goggles is not persuasive. To allow an exception to § 252.227-7018 as the plaintiff advocates would be contrary to the language of the regulation, contradict its intent, and ultimately render the regulatory protection of data unworkable. There simply is no provision in 48 C.F.R. § 252. 227-7018 for the extension of the data rights protection from properly marked data to unmarked delivered data. The interpretation of similar sections of the FAR have also not found such extensions of protection. *See Gen. Atronics Corp.*, 2002 WL 450441 (contractor's submission of a technical manual with a restrictive legend did not protect software submitted without the appropriate restrictive legend); *Bell Helicopter Textron*, 1985 WL 17050 (contractor's submission of 82 technical engineering drawings with a restrictive legend did not protect 21 related drawings submitted without a restrictive legend).

To read an exception into the regulation as the plaintiff advocates would undermine the entire purpose of restrictive legends. Restrictive legends alert all government officials – even those unfamiliar with the data rights of the contractor-that data is considered proprietary and is inappropriate for dissemination. Creating exceptions to the restrictive rights requirement would place government

officials in the difficult position of being unsure which data was subject to restrictions and which was not. The least cost burden in such instances rests with the contractor, who can easily apply an appropriate legend to the proprietary data.[14] Crafting a workable exception to the restrictive legend requirement is beyond the court's constitutional function of interpreting, and not legislating, law. It could also result in the exception consuming the rule. Parties would be left unsure how many items of data could escape without a restrictive legend and still be covered by the legend placed on another item. To be sure, the only result from such as exception would be additional litigation as parties argued about which unlabeled data was covered by which labeled data.

Since plaintiff did not attach the SBIR data rights legend to the PNVG prototypes, no restrictions applied to defendant's use of the prototypes. Defendant was thus within its rights when it shipped the PNVG prototypes to Insight and is therefore entitled to summary judgment on count I.[15]

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[14] *See generally* Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1603-04 (2005) ("Generally speaking, contracts seek (1) to assign the risk of some adverse event that would frustrate performance either to the party that can prevent the event at the least cost or, if the event is not preventable at a reasonable cost, to the party that is the superior risk bearer and (2) to prevent either party from taking advantage of vulnerabilities created by nonsimultaneity of performance.").

[15] While not deciding this issue, it is likely that even if plaintiff had affixed data rights legends to the goggles, or if the notice provided for the technical drawings and documentation could extend to related items like the goggles, defendant would still be entitled to summary judgment because it is doubtful that the

(continued...)

B. Was Plaintiff Entitled to a SBIR Phase III Contract?

Plaintiff seeks summary judgment while defendant seeks dismissal under RCFC 12(b)(6) on count II; plaintiff's claim that a statutory provision required defendant to award

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[15] (...continued)
goggles constituted "data" eligible for protection under 48 C.F.R. § 252.227-7018(b)(4)(ii). FAR § 52.227-20(a) defines "Data" as used in § 252-2277018 as "recorded information, regardless of form or the media on which it may be recorded." 48 C.F.R. § 52.227-20(a). SBIR data is "data first produced by a Contractor that is a small business firm in performance of [a SBIR] contract." *Id.*

Thus, a tangible product delivered under a contract may indeed constitute the embodiment of data, but it is not itself recorded information. Indeed, expert commentators have opined that "the Government may legitimately provide a sample of a product to another company with full knowledge that it will be 'reverse engineered' to learn how to make a duplicate, even if the government may not provide the technical data associated with the object. " MATTHEW S. SIMCHAK & DAVID A. VOGEL, LICENSING SOFTWARE AND TECHNOLOGY TO THE U.S. GOVERNMENT: THE COMPLETE GUIDE TO RIGHTS TO INTELLECTUAL PROPERTY IN PRIME CONTRACTS AND SUBCONTRACTS 63 (2000); *see also* Christine C. Trend, *Killing the Goose that Laid the Golden Egg: Data Rights Law and Policy in Department of Defense Contracts*, 34 PUB. CONT. L.J. 287,293 (2005) ("[U]nless the item is covered by a patent, or is otherwise restricted by contract, the Government may use the item to reverse engineer its design or may provide it to a competitor to do the same.") While plaintiff's original complaint included a claim for general patent infringement tied to defendant's distribution of the prototype to Insight, plaintiff withdrew this claim from its amended complaint, relying instead on just its allegation of a SBIR data rights violation.

plaintiff a SBIR Phase III contract. Plaintiff argues that 15 U.S.C. § 638(j)(2)(C) operates here to create a contractual entitlement to a SBIR Phase III contract and that the Air Force breached this provision when it; decided not to award plaintiff a SBIR Phase III contract. Pl. Mot. Summ. J. 33-34. However, a close examination of plaintiffs arguments reveals § 638(j)(2)(C) creates no contractual obligation for a Phase III as a matter of law and, therefore, the statutory provisions on which plaintiff relies cannot form the grounds of any breach of contract claim in this court. Accordingly, dismissal under 12(b)(6) is only proper.[16]

1. The Statutory and Regulatory Guidelines for SBIR Phase III

To properly understand why the plaintiffs claim for a breach of contract fails as matter of law, a brief examination of the statutory language of 15 U.S.C. § 638 is necessary. To begin with, that section sets out the definition for a SBIR Phase III:

(e) Definitions

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[16] In its opposition to defendant's motion to dismiss, plaintiff claimed for the first time that defendant should be estopped from denying that § 638(j)(2)(C) was incorporated into the parties' Phase II contract. Pl. Mem. Opp'n Summ. J. 11. Because this claim was entirely absent from the amended complaint, as well as plaintiff's moving papers for the motion now being considered, it would be improper for the court to consider plaintiff s estoppel claim. *See Cubic Def. Systs. v.* United States, 45 Fed.Cl. 450, 466-68 (1999) (noting that to permit such a tactic would contravene notice pleading requirements of the modem federal rules of appellate and civil procedure and would condone "litigation by ambush").

. . .

(4) the term "Small Business Innovation Research Program" or "SBIR" means a program under which a portion of a Federal agency's research or research and development effort is reserved for award to small business concerns through a uniform process having –

. . .

(C) where appropriate, a third phase –

(i) in which commercial applications of SBIR-funded research or research and development are funded by non-Federal sources of capital or, for products or services intended for use by the Federal Government, by follow-on non-SBIR Federal funding awards; and

(ii) for which awards from non-SBIR Federal funding sources are used for the continuation of research or research and development that has been competitively selected using peer review or scientific review criteria;

15 U.S.C. § 638(e)(4)(C)(i)-(ii). .

The SBIR Phase III contracts are further explained in § 638(r).

(r) Third phase agreements

(1) In general. In the case of a small business concern that is awarded a funding agreement for the second phase of a SBIR or STTR program, a Federal agency may enter into a third phase agreement with that business concern for additional work to be performed during or after the second phase period. The second phase funding agreement with the small business concern may, at the discretion of the agency

> awarding the agreement, set out the procedures applicable to third phase agreements with that agency or any other agency.
>
> (2) Definition. In this subsection, the term "third phase agreement" means a follow-on, non-SBIR or non-STTR funded contract as described in paragraph (4)(C) or paragraph (6)(C) of subsection (e) of this section.

15 U.S.C. § 638(r)(1)-(2)..

As the plaintiff has noted, § 638 also requires the Small Business Administration ("SBA") Administrator to establish policy directives that provide administrative procedures so that agencies, taking part in the SBIR program award follow-on contracts to SBIR-program participants. In relevant part this section provides that:

> (j) Small Business Administration policy directives for the general conduct of small business innovation research program
>
> . . .
>
> (2) Modifications. Not later than 90 days after October 28, 1992, the Administrator shall modify the policy directives issued pursuant to this subsection to provide for-
>
> . . .
>
> (C) procedures to ensure, to the extent practicable, that an agency which intends to pursue research, development, or production of a technology developed by a small business concern under a SBIR program enters into follow-on, non-SBIR funding agreements with the small business concern for such research, development, or production;

15 U.S.C. § 638G)(2)(C).

Pursuant to this section, the SBA Administrator issued the Small Business Innovation Research Program Policy Directive on January 26, 1993. This Policy Directive was intended to provide guidance to Federal agencies on the general conduct the SBIR program. *See* Small Business Innovation Research Program Policy Directive, 58 FR 6144-02, 61444 (Jan. 26, 1993). Concerning the SBIR Phase III, the Policy Directive stated:

> 7. Small Business Innovation Research Program
>
> . . .
>
> (3) Phase III. The term third phase agreement means to follow-on non-SBIR funded award as described in 1, 2 and 3 below. A federal agency may enter into a third phase agreement with a small business concern for additional work to be performed during or after the second phase period. The second phase funding agreement with the small business concern may, at the discretion of the agency awarding the agreement, set out the procedures applicable to third phase agreements. The competition for Phase I and Phase II awards satisfies any competition requirement of the Competition in Contracting Act.
>
> (a) Where appropriate, there will be a third phase which is funded by:
>
> 1. Non-federal sources of capital for commercial applications of SBIR funded research or research and development.
>
> 2. The federal government by follow-on non-SBIR awards for SBIR derived products and processes for use by the federal government,
>
> 3. Non-SBIR federal sources for the continuation of research or research and development that

> has been competitively selected using peer review or scientific review criteria.
>
> (b) Agencies which intend to pursue research, research and development or production developed under the SBIR Program will give special acquisition preference including sole source awards to the SBIR company which developed the technology. The Phase III funding agreement will be with non-SBIR funds.

58 FR 6144-62 at 6149.

2. Is There a Contractual Obligation for a SBIR Phase III Contract?

Plaintiff argues that § 638(j)(2)(C) was incorporated by operation of law into the parties' Phase II contract and thereby entitled plaintiff to a SBIR Phase III contract given the underlying circumstances, namely plaintiff's successful completion of SBIR Phase I and II obligations. As defendant points out - and is clear from the above cited section - the statute merely directs a government official to establish certain *procedures* to ensure that "follow-on" Phase III contracts will be awarded *"to the extent practicable."* 15 U.S.C. § 638(j)(2)(C) (emphasis added). While § 638(j)(2)(C) clearly directs the SBA Administrator to take action in issuing procedures, nowhere does it impose an obligation directly upon a procuring agency nor does it create any enforceable rights under a SBIR contract.[17]

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[17] Courts have referred to statutes analogous to § 638(j)(2)(C) as "intergovernmental house-keeping statutes." For example, in *Schism v. United States*, 316 F.3d 1259 (Fed. Cir. 2002), the (continued...)

Moreover, the Policy Directive issued by the SBA in January 1993 in accordance with §638(j)(2)(C) contains no requirements obligating an agency to award a Phase III contract.

Not only does § 638(j)(2)(C) not impose any contractual obligation to award a Phase III contract, other portions § 638 clearly indicate that such awards are not mandatory.[18]

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[17] (...continued)
Federal Circuit considered whether 5 U.S.C. § 301 empowered agency officials to promise free lifetime healthcare to war veterans. *Schism,* 316 F.3d at 1279-80. Section 301 provided, in relevant part, "The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business and the custody, use, and preservation of its records, papers, and property." *Id.* at 1279. The court ruled that §301 was merely a housekeeping statute authorizing an agency to attend to its day-to-day affairs, but not authorizing it to create a substantive right to free lifetime healthcare for war veterans. *Id.* at 1278-81; *see also AT&T v. United States,* 307 F.3d 1374, 1377-79 (Fed. Cir. 2003) (holding that § 8118 of the Department of Defense Act, Pub. L. No.100-202, 101 Stat. 1329-84 (1987), which imposed procedural restrictions on when a fixed-price contract could be used, did not create a cause of action or judicial remedy).

[18] Plaintiff's argument that § 638(j)(2)(C) was incorporated into its SBIR contracts under the "Christian" doctrine fails for the fundamental reason that § 638(j)(2)(C) offers nothing to incorporate. "Under the Christian doctrine, a mandatory contract clause that expresses a significant or deeply ingrained strand of public procurement policy is considered to be included in a contract by operation of law." *SS. J. Amoroso Const. Co. v. United States,* 12 F.3d 1072, 1075 (Fed. Cir. 1993) (citing *G.L. Christian & Assocs. v. United States,* 312 F.2d 418 (Ct. Cl. 1963), *affd. on reh'g,* 320 F.2d 345 (Ct. Cl. 1963)). The Christian Doctrine seeks to ensure that "procurement policies set by higher authority not be avoided
(continued...)

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[18] (...continued)
or evaded (deliberately or negligently) by lesser officials" and prevent "ad hoc encroachment or dispensation by the executive" of "dominant legislative policy." *Christian*, 320 F.2d at 351. In this instance, however, the statute plaintiff seeks to incorporate is not a contract clause at all, let alone a "mandatory contract clause" as contemplated *by* the Christian doctrine. On the contrary, § 638(j)(2)(C) merely directs the Administrator to establish certain *procedures* to ensure that "follow-on" SBIR contracts will be awarded "to the extent practicable." Thus, § 638(j)(2)(C) is not mandatory in the sense that it must be incorporated into all government contracts or even all SBIR contracts. Moreover, plaintiff has not persuaded the court that § 638(j)(2)(C) expresses a "significant or deeply ingrained strand of public procurement policy." *Amoroso*, 12 F.3d at 1075. It appears that § 638(j)(2)(C) has no more significance than any other routine provision directing an agency to establish a framework to administer a federal program.

The same maybe said for plaintiffs argument that § 638(j)(2)(C) should be incorporated into the parties' SBIR Phase II contract under the more general rule that law existing at the time of contract formation forms a part of the contract itself. It is beyond doubt that, "[t]he law in effect when a Government contract is made becomes part of the contract." Jackson v. *United States*, 573 F.2d 1189, 1195 (Ct. Cl. 1978). Nevertheless, this general principle only goes so far.

(continued...)

Throughout § 638 the description of procedures for the award of a Phase III is repeatedly qualified with terms such as: "where appropriate" in § 638(e)(4)(C); "*may enter into*" in § 638(r)(1); and "*to the extent practicable*" in § 638(j)(2)(C). The plain language of these sections indicates that the awarding of a Phase III contract is not obligatory for the contracting agency, but instead entrusted to a contracting agency's discretion based on the totality of circumstances. Although not controlling when the language of the statute is clear, as is the case here, this conclusion is buttressed by legislative history confirming that SBIR Phase III awards are discretionary. See SMALL BUSINESS INNOVATION DEVELOPMENT ACT OF 1982, S. REP. No. 97-194 at 28 (1981), *reprinted in* 1982 U.S.C.C.A.N. 512, 539 ("The definition of the third phase was changed to clarify the Committee [on Small Business]'s intent that the funding of this phase be discretionary.").

Accordingly, because the provision upon which plaintiff's claim rests creates no contractual obligations, count II must fail as a matter of law and shall be dismissed under RCFC 12(b)(6).

C. Was There a Breach of an Oral Contract

The plaintiff alleges that Ms. Demos, the contracting officer who handled NVC's SBIR contracts, made an oral

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[18] (...continued)
Implicit in this rule is the requirement that the law sought to be incorporated is relevant - that it contains provisions relating to the formation or performance of the contract and thus imposes a particular duty or obligation on one or both of the parties. Here § 638(j)(2)(C) is irrelevant to the contractual disputes of this case since it imposes no duty to award a SBIR Phase III contract.

agreement with NVC that the Air Force would award a SBIR Phase III contract if NVC satisfactorily completed the SBIR Phase II contract. Pl. Mem. Opp'n Summ. J. 17-18. In its motion for summary judgment on this issue, defendant argues that no such agreement existed as a matter of fact, and that even if it did it would not be enforceable here as a matter of law. D. Mot. Summ. J. 15-17.

To establish the existence of an oral, implied-in-fact contract, a plaintiff has the burden of proffering evidence establishing four criteria, the very same criteria needed to demonstrate an express contract: (1) mutuality of intent to contract, (2) lack of ambiguity in offer and acceptance, (3) consideration, and (4) actual authority *of* the government representative whose conduct is relied upon to bind the government in contract. Trauma Serv. Group v. *United States,104* F.3d 1321,1325 (Fed. Cir. 1997); Lewis *v. United* States, 70 F.3d 597 (Fed. Cir. 1995); City of El Centro *v. United* States, 922 F.2d 816, 820 (Fed. Cir. 1990). It is the responsibility of those entering into an agreement with the government to make sure that the specific government representative they deal with is acting within the bounds of his authority. *Fed. Crop Ins. Corp. v. Merrill,* 332 U.S. 308, 384 (1947); *Flexfab, L.L.C.* v. *United* States, 2005 WL 2347854, *5 (Fed. Cir. Sept. 27, 2005).

Examining the last criterion first, the court finds plaintiff's claim deficient because it has not demonstrated the existence of actual authority by any agent representing the government to bind the United States to the alleged oral contract, regardless of whether plaintiff has established the existence of an oral promise for the Phase III contract. (The court, to be sure, also believes that plaintiff has wholly failed to ascertain even a debatable existence of an oral promise to award a Phase III contract). Indeed, the failure to establish actual government authority by

itself is enough to defeat plaintiff's breach of oral contract claim. *See Trauma Serv. Group*, 104 F.3d at 1325; *City of El Centro*, 922 F.2d at 820. *See also Flexfab*, 2005 WL 2347854 at *5.

Plaintiff explicitly states that it is the representations of Ms. Demos, the contracting officer upon which the oral contract claim lies. *See* Pl. Mem. Opp'n Summ. J. 17-18. In its motion for summary judgment, however, defendant has challenged that there is an absence of evidence tending to show that any representations were made in this case, or that they were made by agent with contracting authority.

Defendant presented the deposition testimony of Ms. Demos, herself, in which she flatly denied "that someone promised NVC a [Phase III] contract" and stated that "there is never a guarantee within the government" that a Phase III contract will necessarily flow from the success completion of a Phase II contract. D. App. 107, 137. Likewise, Ms. Demos did not know of anyone "who made a guarantee that we would go to Phase III" with NVC and did not recall "anyone ever saying that they thought that." *Id.* at 107, 137.

Similarly, the contracting officer that succeeded Ms. Demos on plaintiff's SBIR contracts, Ms. Jones, also denied "that someone promised NVC a [Phase III] contract" and did not recall hearing "anyone ever saying that they thought that." *Id.* at 107. .

These denials by the defendant's witnesses are supported by the Teaming Agreement signed by NVC and Insight in the presence of Air Force personnel at a July 9, 1998 meeting. Pl. App. Ex. 91. In that Teaming Agreement, the parties agreed that Insight would manufacture parts for NVC's "if phase 11 leads to a phase III award." *Id.* These terms of the agreement make it clear that NVC knew that a phase III award was not guaranteed.

Essentially, defendant has presented the court with testimonial evidence of the type contemplated by RCFC 56 that tends to undermine an essential element of plaintiff s claim-namely, that any government agent with contracting authority entered into the type of agreement that plaintiff alleges. Without evidence of a specific agreement made by a specific government agent, it seems plaintiff would fail in its burden to establish several of the jurisdictional predicates of an express or implied-in-fact contract claim, including mutuality of intent to contract, lack of ambiguity in offer and acceptance, and actual authority of the government agent. *See, e.g., Trauma Serv. Group*, 104 F.3d at 1325. Accordingly, defendant has borne the "initial responsibility of informing the . . . court of the basis for its motion, and identifying those portions of `the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of *a* genuine issue of material fact." *Celotex*, 477 U.S., at 323.

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not respond, summary judgment, if appropriate, shall be entered against the adverse party.

RCFC 56(e).

In response to defendant's motion, plaintiff relies primarily on three portions of the record to refute defendant's assertions, or at least create an issue of triable fact on this issue. However, none of these snippets of the record go so far as to establish plaintiff's position or create

an issue of fact for trial that might render awarding summary judgment to defendant improper.

First, plaintiff points to the affidavit provided by Mr. Filipovich, which notes that "[p]rior to April 1998, the Air Force had repeatedly assured NVC that, if SBIR Phase II was successful, then a SBIR Phase III award to NVC would follow. NVC was also assured that if SBIR Phase II were successful, then the Air Force would purchase at least 7,000 PNVG I systems." Pl. App. Ex. A ¶38. The problem in relying on this statement is that it is far too general and vague to satisfy plaintiff's burden of establishing that an oral agreement was entered into on behalf of the government by an agent that had proper contracting authority. *Litton Indus. Prods., Inc. v. Solid State Systs. Corp.*, 755 F.2d 158, 164 (Fed. Cir. 1985) ("[M]ere allegations by declaration or otherwise do not raise issues of fact needed to defeat a motion for summary judgment."); *Doe v. United States*, 58 Fed. Cl. 479, 483 (2003) ("Although Plaintiff has stated in his affidavit that he had an oral contract . . . that bare assertion is not sufficient to create a genuine issue of material fact . . .). To be sure, Mr. Filipovich fails to identify a specific individual, a specific agreement, or any of the other details that might create an issue of fact regarding the statements that Ms. Demos and Ms. Jones made in their deposiitions. *Doe*, 58 Fed. Cl. at 483 ("[S]elf-serving affidavits without factual support in the record will not defeat a motion for summary judgment.") (quoting *Shank v. William R. Hague, Inc.*, 192 ;, F,3d 675, 682 (7th Cir. 1999).

Second, plaintiff relies on deposition statements by Mr. Karacic, an owner and principal of NVC, that describe what he believed to be "guarantees" of a Phase Ill award. But these statements fall short of the mark because the types of statements upon which Mr. Karacic relied as "guarantees" fall far short of the definitive kind of state-

ment that might give rise to an oral contract. In his deposition, Mr. Karwic engaged in the following exchange:

> Q. Did the Air Force ever guarantee to anyone at Night Vision that there would be a SBIR Phase III award?
>
> A. Oh yes:
>
> Q. And who made that guarantee?
>
> . . .
>
> A. [Among others,] Judy Demos....
>
> Q. Did they make those statements -
>
> A. Continuously, repeatedly.
>
> . . .
>
> Q. Okay. Let me just ask you this: So your testimony as I understand it is that there are documents in the record that would reflect a guarantee from the Air Force to Night Vision of a SBIR Phase III award?
>
> A. When you say the word "guarantee," I don't know if the word "guarantee" can be extracted from the document, but the documents will recite "when we are in a Phase III," "when we are doing a Phase III" "when we are working for a Phase III." What does that tell you?
>
> Q. Do you believe those constitute a guarantee?
>
> A. Oh, yes. I believe that the - yes, very much so . . .
>
> Q. Do you know if there were any oral statements made. by the Air Force either to yourself or anyone else at Night Vision, including Mr. Filipovich, in which the. Force guaranteed that there would be a SBIR Phase III award to Night Vision Corporation?

A. Yes.

Q. Can you tell me about those oral statements?

A. There were several meetings where they would say, "When you're in Phase III", "When we have Phase III." And then we would discuss funding of Phase III. All of this would have been irrelevant if we weren't talking about a Phase III.

Q. And it's your testimony that those statements constitute guarantees by the Air Force to Night Vision Corporation?

A. Yes. Yes. As they would to any layperson.

Pl. App. Ex. J at 157-59 (Deposition of Thomas J. Karacic).

As Mr. Karacic's testimony makes abundantly clear, the types of specific Statements that he recalled as giving rise to the "guarantees" upon which plaintiff relies were really nothing more than statements of planning. The fact that the parties may have been optimistic at the time about the prospect of a Phase III award and discussed the types of activities that might be required if and when NVC was performing under a Phase III contract does not rise to the dignity of the type of assurance that a Phase III contract would necessarily be awarded as a matter of course. Even if the court were to attribute to Ms. Demos all of the statements to which Mr. Karacic referred in his deposition, those statements are not inconsistent with and do not call in to question the statement that Ms. Demos made in her deposition that she did not promise plaintiff a Phase III award. Accordingly, Mr. Karacic's deposition testimony is insufficient to create an issue of fact regarding whether the Air Force ever entered into a binding oral contract or made binding oral promises to plaintiff that a Phase III

contract would definitely be awarded.[19] To hold otherwise is to mangle the obvious import of the proffered deposition testimony, something the court is not required to do even when giving plaintiff the benefit of the doubt as the nonmoving party. *See Celotex*, 477 U.S. at 324. Simply put, plaintiff has failed its burden at this stage of the summary judgment proceeding to respond to defendant's allegations with cogent evidence. *Id.*

Finally, plaintiff relies on notes from a meeting with NVC on August 27,1999, taken by Ms. Jones. P1. App. Ex. 277. Under the heading "NVC's PURPOSE" Ms: Jones summarized the arguments NVC presented at the meeting as: "'Sob Story' company is going under and it is the Government's fault because NV C (I think) has been promised a Phase III somewhere along the way. Now the Government is telling NVC we are not sure if that is in the strategy." *Id.* Regarding Air Force Counsel Debbie Muldoon's reaction to the meeting, the notes state: "She got the same feeling I did from the meeting and that is she thinks we have promised NVC a Phase III proposal somewhere along the way." *Id.*

The statements in these notes might seem to get plaintiff closer to defeating summary. judgment because taken in isolation they seem to raise an inference to some sort of promise being made by government employees. The problem, however, is that defendant has *specifically* challenged plaintiffs failure to establish that an agent with

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[19] Even Mr. Karacic himself seemed to concede this. He noted in his deposition that NVC was preparing to submit a Phase III proposal as late as April 1999, his earlier comments about having already been "guaranteed" the Phase III award notwithstanding. Pl. App. Ex. J at 276. NVC did not, however, ever submit a Phase III proposal. *Id.*

contracting authority was the source of any of the myriad "promises" of a Phase III award that plaintiff alleges. While Ms. Jones' meeting notes might signal the existence of some nebulous promise, this evidence provides absolutely no information that tends to rebut defendant's argument or Ms. Demos' and Ms. Jones' deposition statements. Simply put, the notes are not sufficient to overcome plaintiff's Rule 56 and *Celotex* burdens of presenting the court with information that might give rise to a genuine issue of material fact on this issue.

And critical to the court's determination is that even if plaintiff could produce adequate evidence demonstrating the existence of specific oral promises, such promises would have been ineffectual because applicable agency regulations were not complied with. The net result of this dooms plaintiffs claim because it necessarily means a lack of contracting authority. "[A]gency procedures must be followed before a binding contract can be formed." *Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429, 1433 (Fed. Cir. 1998). "Oral assurances do not produce a contract implied-in-fact until all the steps have been taken that the agency procedure requires; until then there is no intent to be bound. Thus, it is irrelevant if the oral assurances emanate from the very official who will have authority at the proper time, to sign the contract or grant." *New Am. Shipbuilders, Inc. v. United States*, 871 F.2d 1077, 1080 (Fed. Cir. 1989); *American Gen. Leasing, Inc. v. United States*, 587 F.2d 54, 57-58 (Ct. Cl. 1978) (holding that express oral agreement with government agent was not binding because, among other factors, applicable regulations required contract to be in writing).

In this instance, both the SBIR statute and the FAR require more than simple oral agreements for a SBIR Phase III contract. The SBIR statute directs procuring agencies to award SBIR contracts through "solicitations,"

and upon review of "SBIR proposals." 15 U.S.C.§638(g). Under the FAR all contracts "except as otherwise authorized" must be "in writing." Federal Acquisition Regulations, 48 C.F.R. § 2.101 (2005). The very nature of the plaintiff's claim concedes that these procedures were not followed. Simply put, it is uncontroverted that plaintiff never submitted a SBIR Phase III proposal for defendant to evaluate, and plaintiff has produced no evidence tending to demonstrate the existence of a written agreement. Without some indication that these required procedures were followed, any oral promises of a Phase III award-even assuming the existence of such promises (a proposition which plaintiff has not demonstrated) -would be unenforceable.

Consequently, because plaintiff has failed to demonstrate that it acted upon the representations of a government agent that had actual contract authority, defendant's motion for summary judgment on the breach of oral contract claim must be granted.[20]

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[20] As an additional ground for summary judgment, defendant argues that there is no evidence of consideration for an oral agreement to award a Phase III contract. In response, plaintiff essentially points to the affidavit of Mr. Filipovich in which he alleges that NVC performed above and beyond the performance requirements of the Phase II contract in expectation or anticipation of receiving a Phase III contract. The court agrees with defendant that Mr. Filipovich's statements are so ambiguous that its presentation does not meet plaintiff's burden in responding to defendant's summary judgment motion with concrete evidence that would create an issue of fact as to the existence of consideration for an oral contract. *See Litton Indus. Prods., Inc.*, 755 F.2d at 164; *Doe*, 58 Fed. at 484 (granting summary judgment because plaintiff presented no evidence to support his affidavit's claim that he had an oral contract with the government). Plaintiff has failed to identify any specific facts in the record

(continued...)

D. Has Plaintiff Properly Pled or Demonstrated a Breach of the Duty of Good Faith and Fair Dealing?.

Plaintiff argues that if the court finds that there was no contract, the court should grant it summary judgment on count IV, the duty of good faith and fair dealing claim. The court notes that this count, in addition to plaintiff's bid protest count discussed subsequently, is predicated upon

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[20] (...continued)
which would support its allegation that it invested additional sums of money or any evidence which indicates how much additional money was spent on the project, or for what in particular purposes these additional expenditures were used.

To be sure, Mr. Filipovich's assertions regarding plaintiff's performance under Phase II runs counter to the black letter law that "[p]erformance of a pre-existing legal duty is not consideration." *Gardiner, Kamya & Assocs., P.C. v. Jackson*, 369 F.3d 1318, 1322 (Fed. Cir. 2004); *Sinclair v. United States*, 56 Fed. Cl. 270, 278 (2003); *see* RESTATEMENT (SECOND) OF CONTRACTS § 73 (1981). Under the SBIR Phase II contract, plaintiff received funding from the defendant in exchange for the delivery of technical drawing and prototype goggles. This was the essence of the plaintiff's bargain. Mr. Filipovich's testimony seems to indicate that plaintiff expended more money than necessary during the SBIR Phase II in anticipation of a Phase III award. Mr. Filipovich's testimony, however, fails to address how the defendant was benefited in any way by these alleged additional expenditures. Based on the evidence presented by plaintiff, it would seem that defendant promised to award a SBIR Phase III in exchange for the performance of plaintiffs SBIR Phase II obligations. There is a dearth of evidence, however, indicating plaintiff conferred any benefit on defendant that differed from what was required by the Phase II contract in a way which reflects more than a pretense of bargain. Therefore, consideration for any alleged binding promise was lacking.

what plaintiff terms the clear fact that "the Air Force violated its implied duty of good faith and fair dealing by unreasonably denying a sole source phase III award to NVC." Pl. Am. Compl.¶111. According to plaintiff, the breach of the implied duty to of good faith and fair dealing does not have to arise from specific provisions of a contract, or even from a bid protest, but instead may have its genesis in a "legitimate expectation" of receiving a contract. Pl. Mem. Opp'n Summ. J. 22. To plaintiff, because it was a "contracting partner" with the Air Force in the Phase II contract, it was entitled "to receive a sole source Phase III award" "particularly in light of the SBIR-Laws." *Id.*

Defendant, on the other hand, seeks dismissal under RCFC 12(b)(6) on the basis that the duty of good faith and fair dealing applies only to specified contractual obligations, while plaintiff's claim assumes there was no particular contractual obligation to award a SBIR Phase III contract. D. Mot. Summ. J. 17-18. Defendant also argues that the Air Force's decisions (both against awarding a Phase III contract to NVC and for awarding contract no. F33615-00-C-6000 to Insight) were well-founded, not the result of bad faith. *Id.*

Looking at the facts alleged in the plaintiff's complaint, it is clear that it does not state a cognizable claim and that defendant's 12(b)(6) motion should therefore be granted. Dismissal under Rule 12(b)(6) "is proper only when a plaintiff `can prove no set of facts in support of his claim which would entitle him to relief," *Adams v. United States,* 391 F.3d 1212,1218 (Fed. Cir. 2004) (quoting *Leider v. United States,* 301 F.3d 1290, 1295 (Fed. Cir. 2002)), and this plaintiff has not done.

While plaintiff is indisputably correct that the government has a duty of fair dealing in the procurement process, *see, e.g., Emery Worldwide Airlines, Inc. v. United States,*

264 F.3d 1071, 1078-80 (Fed. Cir.2001); *Impresa Construzioni Geom. Domenico Garufi v. United States;* 238 F.3d 1324, 1331-1332 (Fed. Cir. 2001), and that the government is required to conduct its business honestly and fairly with both its contracting and prospective contracting partners; see Federal Acquisition Regulation, 48 C.F.R § 1.102-2(c), (c)(3) (2005) (government required to "[c]onduct business with integrity, fairness, and openness . . . and comply with applicable laws and regulations in dealing with contractors and prospective contractors"), plaintiff is on shaky grounds when it argues that the government breached its duty of good faith and fair dealing arising from plaintiffs "legitimate expectation" of receiving a contract-allegedly here the Phase III contract. Surely, what plaintiff is attempting is to dress a wolf in sheep's clothing. To be sure, at its heart this contention is nothing more than the rejected arguments that either, or both, the statutory scheme or the successful completion of the Phase II contract mandate the award of the Phase III contract to plaintiff.

Plaintiff s citation to *Temple-Inland, Inc. v. United States,* 59 Fed. Cl. 550, 559-60 (2004) for the proposition that "the government implicitly promises that it will not use its power to destroy the legitimate expectations of its contracting partners," is inapposite. Pl. Mem. Opp'n Summ. J. 22. That case involved the government's breach of the implied covenant of good faith and fair dealing in a thrift bailout agreement when Congress enacted the so-called Guarini legislation in 1993, which retroactively eliminated the tax deduction for covered asset losses and, thus, in part, vitiated the benefits provided by the thrift agreement. In *Temple-Inland,* this court addressed the covenant in the context of a duty "not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract." *Cenrex Corp. & CTX Holding Co. v. United States,* 395 F.3d 1283, 1304 (Fed.

Cir. 2005). This implied covenant thus prevents the government from targeting its contracting partners' reasonable expectations, including when it acts in its capacity as a sovereign. *See Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569, 1575 (Fed. Cir. 1997) ("The Government-as-contractor cannot exercise the power of its twin, the Government-as-sovereign, for the purpose of altering, modifying, obstructing or violating the particular contracts into which it had entered with private parties."). Clearly, the case has at its predicate the existence of a valid, mutually assented-to contract, for which a covenant arises that proscribes the government from interfering with reasonable expectations flowing from that particular contract.

Accordingly, Plaintiff Night Vision's argument of "reasonable expectation" must be based upon. a right or entitlement to a Phase III contract founded on a pre-existing contract or statutory right. For the covenant to be breached, there must first be a trigger to the duty of good faith performance. Since there was no contract, express or implied, that required an award of a Phase III contract, and the SBIR statutory and administrative scheme did not automatically award such a contract to plaintiff even if it successfully completed Phase II, plaintiff's claim here must necessarily fall.

Illustrative of the over-all point of law is Alaska v. United States, 35 Fed. Cl. 685, 704 (1996). In that case, the State of Alaska argued that the legislation granting it statehood in 1959 created a contract between the state and the federal government. The language which Alaska argued gave rise to a contractual relationship was implied in a portion of the statehood legislation that amended the Mineral Leasing Act 30, increasing Alaska's mineral leasing revenue amount by 52.5%. U.S.C. § 187 *et seq.* (1994) ("MLA"). Alaska argued that the amendment created an implied -contract under which there was an

implied duty of. good faith and fair dealing on the part of the government to maximize revenue from the federally held lands. *Alaska, 35* Fed. Cl. at *704.* This obligation, Alaska claimed, was violated when the federal government refused to exploit the Arctic National Wildlife Refuge ("ANWR). *Id.* The court disagreed, noting that amendment to the MLA was not a substantive obligation, mutually agreed to by the parties. *Id.* at 704. The court found that Alaska's reasoning "would have the implied duty of good faith and fair dealing create by implication an express obligation to open up specific federal lands to generate additional revenue for the States. There is no such express substantive obligation in [the amendment]." *Id.* at 704-05.

Plaintiff makes essentially the same mistaken argument as did the State of Alaska. To the extent plaintiff argues that the government violated the covenant of good faith and fair dealing, plaintiff fails to show the existence of a contract, let alone the precise contractual terms to which the covenant attached. Plaintiff alleges that defendant "was bound by a duty of good faith, and fair dealing to treat [plaintiff] fairly in all facets of the procurement process" and that by "unreasonably denying" a SBIR Phase III contract to plaintiff, defendant violated this duty. *Id.* Beyond these *ipse dixit* allegations, plaintiff's arguments in favor of its good faith and fair dealing claim make no mention of any particular contractual obligation or statutory scheme that defendant allegedly breached. On the contrary, it is abundantly clear that plaintiff's claim relates to its unilateral expectation regarding future contracts that it hoped to obtain-an expectation not an entitlement mandated by statute or provided by contract.

There exists no substantive provision in any prior contract, mutually assented to by the parties, statute, or regulation, obligating the government to award or even

consider the plaintiff for a SBIR Phase III. Just as in *Alaska* where there was nothing in the amendment specific to ANWR, there is nothing that exists which specifies that a SBIR Phase III must be awarded to plaintiff. Plaintiff "is simply shoe-horning an obligation by the government to" award a SBIR Phase III "into a contract where neither the text nor the intent of the parties supports it." *Franklin Sav. Corp. v. United States*, 56 Fed. Cl. 720,743-45 (2003). Although the obligation of good faith and fair dealing is a real one, it is not a catch-all, whereby plaintiff can retroactively insert specific obligations into an otherwise silent contract. To hold otherwise "would allow the covenant of good faith and fair dealing to supplant specific terms of the contract." *Id.* at 745.

Because plaintiff does not allege that defendant violated its duty of good faith and fair dealing with respect to any specific obligation imposed by the parties' contracts, or, as demonstrated above, shown that a statute or regulation required the award of the Phase III contract, plaintiff failed to state a claim for which relief can be granted. The court thus dismisses count IV of the complaint pursuant to RCFC 12(b)(6).

E. Bid Protest[21]

Finally, defendant seeks judgment on the administrative record on count V, the bid protest count. In the bid protest, plaintiff generally alleges that (1) NVC's proposal should have been ranked first and (2) Insight's proposal should not have been ranked first. As a result, plaintiff

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[21] Facts for this section are derived from exhibits in the Administrative Record ("AR"), Defendant's Statement of Facts for Count V ("D. SF"), and Plaintiff's Counter-Statement of Facts for Count V ("PL. CSF").

contends the evaluation of the proposals were arbitrary and capricious. PI. Am. Compl.¶¶ 115-117. Defendant argues both that plaintiff cannot prove prejudice (because NVC's bid was beyond the zone of active consideration) and that plaintiff cannot produce evidence that the Air Force abused its discretion in awarding the contract to Insight. D. Mot. Summ. J. 18-22. The court agrees with defendant's arguments.

Rule 56.1 of the Rules of the Court of Federal Claims (RCFC) provides for judgment on the administrative record, which is a procedural tool unique to the Court of Federal Claims with no counterpart in the Federal Rules of Civil Procedure. *Banknote Corp. of America, Inc. v. United States,* 365 F.3d 1345, 1352 (Fed. Cir. 2004); but *see* Court of International Trade Rule 56.1. "RCFC 56.1 sets forth the standard by which the court reviews factual determinations in a judgment on the administrative record." *Bannum, Inc. v. United States,* 404 F.3d 1346,1353 (Fed. Cir. 2005). RCFC 56.1 is "a rule designed to provide for trial on a paper record, allowing fact-finding by the trial court." *Id.* at 1356. In particular, RCFC 56.1 does not incorporate any basis for denying judgment based on a genuine issue of material fact or for drawing inferences in favor of the non-moving party. *Id.* Instead, the rule requires this court to make factual findings based on the record before it and make decisions in light of those factual findings. *Id.* at 1354.

1. Was the Evaluation of Plaintiff's Proposal Arbitrary and Capricious?

Once the court is satisfied that a plaintiff has standing to bring a bid protest "[a] bid protest proceeds in two steps." *Bannum,* 404 F.3d at 1351. First, the court must determine whether defendant's evaluation of plaintiff's proposal was "arbitrary, capricious, an abuse of discretion,

or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Bannum*, 404 F.3d at 1351. Second, and only if the court finds the defendant violated 5 U.S.C. § 706(2)(A), the court must "determine, as a factual matter, if the bid protester was prejudiced by that conduct." *Id.* Before proceeding with this analysis, it is important for this court to examine the standing of the plaintiff to bring the bid protest.

a. Is There Injury-in-Fact Standing?

Standing is a threshold jurisdictional issue and one the Federal Circuit has repeatedly stressed, must be determined at the outset in bid protest cases. *Info. Tech. & Applications Corp. v. United States*, 316 F.3d 1312, 1319 (Fed. Cit. 2003); *Myers Investigative & Sec. Servs., Inc., v. United States*, 275 F.3d 1366, 1369 (Fed. Cir. 2002). The party invoking federal jurisdiction bears the burden of establishing standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Rothe Dev. Corp. v. Dept of Def.*, 413 F.3d 1327, 1334 (Fed. Cir. 2005). In bid protests, standing "is limited to actual or prospective bidders or offerors whose direct economic interest would be affected by the award of the contract or by failure to award the contract." *Am. Fed 'n of Govt Employees v. United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001). For its "direct economic interest" to be affected, the protestor must show that it was prejudiced by the award. *Info. Tech.*, 316 F.3d at 1319; *Myers*, 275 F.3d at 1370 ("prejudice (or injury) is a necessary element of standing"). . To establish prejudice the protestor must have had a substantial chance of obtaining the contract, assuming that the protester's substantive allegations bear out. *Id.*

Since the need to establish standing is not a mere pleading requirement "but rather an, indispensable part of the plaintiffs case, each element must be supported in the

same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan,* 504 U.S. at 561. In the case of Judgment on the administrative record, there must be facts in the record that demonstrate that plaintiff had a substantial chance of obtaining the contract. *Compare Impresa,* 238 F.3d at 1334 (finding standing because, assuming the bid protest was successful, the protestor could compete for the contract), *with Fed Data Corp. v. United States,* 911 F.2d 699 (Fed. Cir. 1990) (finding no standing because a bidder withdrew from the procurement, and assuming the bid protest was successful, the award would go to another patty), *and* United *States v. Int'l Bus. Machs. Corp.,* 892 F.2d 1006 (Fed. Cir. 1989) (finding no standing because a bidder was rated below second place, and assuming the bid protest challenging the ranking of the first place bidder was successful, the award would go to another party), *and MCI Telecomms. Corp. v. United States,* 878 F.2d 362 (Fed. Cir. 1989) (finding no standing because the protestor did not submit a proposal for the bid, and assuming the bid protest was successful, the award would go to another party). This initial evaluation of the administrative record is only to determine if there are sufficient facts in the record to establish standing-it does not include weighing facts and making substantive determinations on the merits. *Media Techs. Licensing, LLC. v. Upper Deck Co.,* 334 F.3d 1366, 1370 (Fed. Cir. 2003) (`Because standing is jurisdictional, lack of standing precludes a ruling on the merits.").

In this case the administrative record shows the minium requisite evidence necessary for plaintiff to demonstrate prejudice and therefore standing with respect to its claim that defendant improperly ranked plaintiff's bid too low. The Air Force Research Laboratory ("AFRL") posted Program Research and Development Announcement

("PRDA") No. 00-01-HE on December 16, 1999. AR Ex. 34. The purpose of the PRDA was "to award a negotiated, 24-month Advanced Technology Demonstration ("ATV") contract" for what the Air Force called Integrated Panoramic Night Vision Goggles ("IPNVG"). *Id.* Three companies submitted bids in response to the PRDA: NVC, Insight, and Litton. Pl. CSF ¶10. On March 22, 2000, following technical evaluations of the proposals, the evaluation team ranked Insight first, based upon technical merit, followed by Litton. NVC's proposal was ranked as "Category III" and ineligible for award, because it did not meet agency needs. *Id.* Since the plaintiff alleges that it was unreasonably denied the first ranking, assuming plaintiff's bid protest is successful, plaintiff would be prejudiced and would have a substantial chance at being awarded the contract.[22] *See Info. Tech.*, 316 F.3d at 1319 (protestor . established standing "because it has a greater than an insubstantial chance of securing the contract if successful on the merits of the bid protest").

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[22] This limited review for prejudice in standing is in keeping with the U.S. Supreme Court's notions of what is necessary for a plaintiff to establish standing:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, *there is ordinarily little question* that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.

Lujan, 504 U.S. at 561-62 (emphasis added).

b. Was the Evaluation Arbitrary and Capricious?

Since plaintiff has standing to challenge defendant's evaluation of its proposal; the court must next determine whether that evaluation violated the APA. In the procurement process "contracting officers are `entitled to exercise discretion upon a broad range of issues confronting them.'" *Impresa*, 238 F.3d at 1332 (quoting *Latecoere Int'l, Inc. v. United States Dept. of Navy*, 19 F.3d 1342, 1356 (11th Cir. 1994)). The court looks to see whether "the contracting agency provided a coherent, and reasonable explanation of its exercise of discretion." *Id.* Under this review, the plaintiff "bears a `heavy burden' of showing that the award decision `had no rational basis.'" *Id.* 1333 (quoting *Saratoga Dev. Corp. v. United States*, 21 F.3d 445, 456 (D.C. Cir. 1994)).

Reviewing the administrative record, the court notes that through the PRDA, the AFRL was seeking the development of

> innovative NVG systems)[,] for both fixed wing and rotocraft aircraft as well as ground personnel[,] that addresses wide field-of-view, laser eye protection, fit/comfort, image quality, integrated symbology/imagery display, field support, ejection/crash/ground egress safety, compatibility with existing systems, supportability, maintainability, producibility[,] reliability, and affordability.

Pl. CSF ¶ 2. The PRDA instructed bidders to submit a proposed statement of work, description of the proposed technical approach, information regarding the bidder's management and production capabilities, resumés of technical personnel, and a separate cost business proposal. *Id.* ¶13.

The evaluation factors were technical merit (the highest priority); cost/price, including reasonableness and realism (a secondary priority); and an assessment of project risk versus the potential rewa ds. *Id.* ¶ 4. Technical merit included, in descending order of importance, (a) soundness of approach; (b) availability of qualified personnel and experience; (c)understanding of the problem; and (d) the use of new and creative solutions. *Id.* The announcement advised that "[n]o other evaluation criteria will be used." *Id.*

In a letter dated January 28, 2000, Ms. Jones informed potential bidders that the "Air Force is not looking for a copy of the PNVG as designed under the previous [SBIR] contracts[,] which is why we have elected to issue a [PRDA, which] encourages industry to propose new and creative solutions." *Id.* 17.

NVC, Insight, and Litton submitted bids in reponse to the PRDA. *Id.* ¶10. On March 22, 2000, following technical evaluations of the proposals, the evaluation team ranked Insight first, based upon technical merit, followed by Litton. NVC's proposal was ranked as "Category III" ineligible for award, because it did not meet agency needs. *Id.*

Regarding the "Soundness of Offeror's Technical Approach," describing plaintiff's technical merit (the primary evaluation factor), the technical evaluation team stated that plaintiff's "optical approach to achieve a 90 [degree] horizontal field of view is good" and "image quality tradeoffs for FOV/resolution were well-developed." AR Ex. 96 at 969. However, the technical evaluation team concluded that plaintiff's "overall technical approach is not sound." *Id.* Specifically; the technical evaluation team noted that "NVC's proposal frequently states a problem as identified in the PRDA and that they plan to fix it, but without any approach to accomplish this" and that" most PRDA

parameters are stated as 'will-dos' with minimal discussion of the trade-offs to be considered." *Id.* The technical approach portion of the evaluation also noted other deficiencies including "minimal discussion of '-----ilities' [i.e., supportability, maintainability, producibility,. reliability, and affordability] with absolutely no discussion of producibility or manufacturability." *Id.* In summary of this part, the evaluation states: "The overall proposal is very weak and many technical parameters are not addressed." *Id.* at 970.

Regarding the "Availability of Qualified Technical Personnel and their Experience," the evaluation states that plaintiff "has three employees/consultants that have a good background on development and design" relevant to its proposal. *Id.* However, the evaluation stated that plaintiff "did not provide resumes for the mechanical engineer, quality assurance engineer, assembly technician or program manager" and stated that due to this deficiency "it is not clear that [plaintiff] can support the full scope of the program." *Id.*

Regarding the "Understanding of the Problem" aspect of the bid, the technical evaluation team summarized its comments by stating: "NVC has previously developed and demonstrated an understanding of the complex issues pertaining to folded optic NVG designs." However, "NVC's proposal did not address the majority of PRDA technical parameters in any detail to substantiate understanding of those areas." *Id.*

The overall summary of the evaluation regarding NVC's bid concluded: "NVC's proposal is very weak and did not address many of the technical areas necessary to fully detail their selected approach to the problems set forth in the PRDA. The majority of the program team has not been identified and there is no supporting documentation from

any of the subcontractors, showing cost or commitment to perform." *Id.* at 971. "Therefore," the evaluation concluded, "NVC's proposal does not meet agency needs." Id On this basis, the Air Force concluded that plaintiff s proposal "[did] not meet the subject announcement requirement" and "[would] not be considered for further award." AR Ex. 107 at 986.

The record before the court seems to adequately support the agency's conclusions that plaintiff's proposal was strikingly incomplete and inadequate to merit meaningful consideration in the procurement process. Plaintiff's proposal repeatedly asserted that it would solve identified problems, but unlike the other proposals defendant received, plaintiff s failed to explain how those problems would be overcome. For example, under almost every subpoint in "6.0 Safety of Flight" section of plaintiff's proposal, the plaintiff stated "the PNVG system shall be fully compatible with" requirements with no other specifics. AR Ex. 83 at 466-69. Similarly, plaintiff's proposal failed to provide information on who, if anyone, would fill significant technical and production capabilities. Especially considering that plaintiff's organization lacked any direct manufacturing capability, and the subject contract called for a production requirement, the failure to adequately describe productability and manufacturablity was particularly glaring. In light of these relevant facts, the agency's decision to rank plaintiff's proposal as "Category III" and ineligible for award seems both justified and appropriate.

Responding to these facts, plaintiff does not discuss specific aspects of the evaluation of its bid. The protestor "pointed to no record evidence of bias. Instead it has merely reiterated its contentions that the Air Force erred in evaluating the proposals. This is not evidence of bias, and it is insufficient to overcome the presumption that contracting officer acted in good faith." *Info. Tech.*, 316 F.3d at 1323 n.2. Nor does plaintiff direct the court to

evidence in the administrative record tending to show that the Air Force's evaluation of its bid was somehow arbitrary, capricious, an abuse of discretion, or contrary to law. Instead, plaintiff simply contradicts, in sweeping statements, the truth of the statements in the evaluation. None of these points, however, answers for the fact that plaintiff submitted a bid that was incomplete in several important areas. Based on this administrative record, there is no basis for the court to determine that the defendant's evaluation of the plaintiffs proposal was arbitrary, capricious, or an abuse of discretion. *See Info. Tech., 316* F.3d at 1323.

c. Did the Evaluation Result in Prejudice?

Had there actually been any errors in the procurement process, this court would next have had to determine whether those errors prejudiced plaintiff. *Bannum,* 404 F.3d at 1353; *Alfa Laval Separation, Inc. v. United States,* 175 F.3d 1365,1367 (Fed. Cir.1999). To establish prejudice, the plaintiff would have to show there was a substantial chance that it would have received the contract but for the errors' in evaluating its proposal. *Bannum,* 404 F.3d at 1353; *Info. Tech.,* 316 F.3d at 1319; Alfa *Laval,* 175 F.3d at 1367. In this case, since defendant's evaluation of NVC's proposal was not arbitrary and capricious, there were no errors that could have prejudiced plaintiff. It is therefore unnecessary to engage in a full review of the facts for the merits *of* prejudice. See Info. *Tech.,* 316 F.3d at 1323 (not engaging in review of the merits for prejudice, because no errors were found in the contracting process).

2. Was the Evaluation of Insight's Proposal Arbitrary and Capricious?

The second line of reasoning plaintiff. advances for its bid protest is that Insight was unqualified to receive the award and that the evaluation of Insight's proposal was therefore arbitrary and capricious. Pl. Am. Compl. In 115-117. In this instance, the facts in the administrative record indicate that plaintiff does not have standing to assert this claim and the court will not consider it.

As mentioned, standing is a predicate issue this court considers in a bid protest *Info. Tech.*, 316 F.3d at 1319; *Myers, 275* F.3d at 1369. For standing there must be prejudice, in the sense that there must be a showing there was a substantial chance the protestor could have received the proposal proposal. The facts in the administrative record indicate that Insight, Litton and NVC each submitted proposals in response to the PRDA. Insight's proposal was ranked first, Litton's second and NVC's third, as "Category III" ineligible for award. Pl. CSF ¶10. Under these facts, even assuming plaintiff's arguments were correct and the evaluation of Insight's bid was arbitrary and capricious, Litton would receive the award because it was ranked second in the competition.

There is no argument on the behalf of the plaintiff and no evidence presented Litton's ranking itself was arbitrary and capricious. Plaintiff does point out that in the record the technical evaluation committee noted that: "[Litton's] proposal provided only limited information on the design approach theyplan to pursue and this makes it difficult to fully assess the amount of risk with their effort." AR Ex. 96 at 968. Plaintiff's argument is not that Litton's ranking was incorrect, but rather that NVC should have been ranked higher than Litton. Having determined that the evaluation of NVC's proposal was not arbitrary and capricious, and with no allegation that Litton's

ranking was inappropriate, this court has no reason to conclude that Litton's second place ranking was improper.

As a result, plaintiff has not established that it has standing to challenge the evaluation of Insight's proposal as arbitrary and capricious. Plaintiff cannot show it had a substantial chance to receive the bid, since Litton was ranked second and was next in line to receive the bid Without a substantial chance to receive the award, plaintiff lacks standing to proceed with this claim. *See Intl. Bus. Machs.* Corp., 892 F.2d 1006 (finding no standing because a bidder was rated below second place, and assuming the bid protest was successful, the award would go to anotherparty); *Greenleaf Constr. Co. v. United States, 67* Fed Cl. 350,362 (2005) (denying standing since a party "may only posit arguments that demonstrate that, but for the government's alleged breach, it would have had a substantial chance at winning the award").

Since the evaluation of NVC's proposal was not arbitrary and capricious and since plaintiff has no standing to challenge the evaluation of Insight's bid, defendant's motion for judgment on the administrative record is granted.

IV. Conclusion

For all of the foregoing reasons, plaintiffs motion for partial summary judgment on counts I, II and IV is **DENIED**, defendant's motion for summary judgment on counts I and III is **GRANTED**, defendant's motion to dismiss counts II and IV is **GRANTED**, and defendant's motion for judgment on the administrative record on count V is **GRANTED**.

JUDGMENT for the Defendant.

NO COSTS.

IT IS SO ORDERED.

s://Lawrence J. Block

Lawrence J. Block

Judge

September 24, 2002 SBIR Program Policy Directive, 67 FR 60072 (excerpts)

SBIDA requires the U.S. Small Business Administration (SBA) to 'issue Policy Directives for the general conduct of the SBIR programs within the Federal Government.'

67 FR 60072, 60072.

It is clear that Congress intends, to the greatest extent practicable, that agencies issue Phase III awards to the SBIR awardees that developed the technology.

Id. at 60075-76.

Federal agencies participating in the SBIR Program (SBIR agencies) are obligated to follow the guidance provided by this Policy Directive.

Id. at 60082.

4. Competitively Phased Structure of the Program

The SBIR Program is a phased process, uniform throughout the Federal Government, of soliciting proposals and awarding funding agreements for R/R&D, production, services, or any combination, to meet stated agency needs or missions. In order to stimulate and foster scientific and technological innovation, including increasing commercialization of Federal R/R&D, the program must follow a

uniform competitive process of the following three phases:

(a) Phase I. Phase I involves a solicitation of contract proposals or grant applications (hereinafter referred to as proposals) to conduct feasability-related experimental or theoretical R/R&D related to described agency requirements. . . . The object of this phase is to determine the scientific and technical merit and feasability of the proposed effort and the quality of performance of the SBC with a relatively small agency investment before consideration of further Federal support in Phase II.

* * *

(b) Phase II. The object of Phase II is to continue the R/R&D effort from the completed Phase I. Only SBIR awardees in Phase I are eligible to participate in Phases II and III. . . .

* * *

(c) Phase III. SBIR Phase III refers to work that derives from, extends, or logically concludes effort(s) performed under prior SBIR funding agreements, but is funded by sources other than the SBIR Program. . . .

Id. at 60084-85.

(a) The Act requires each agency participating in the SBIR Program to:

* * *

(12) Report at least annually to SBA's Office of Technology all instances in which an agency pursued research, development, production, or any such combination of a technology developed by [a small business concern] using an award made under the SBIR Program of that agency, where the agency determined that it was not practicable to enter into a follow-on non-SBIR Program funding agreement with that concern. The report must include, at a minimum:

(i) the reasons why the follow-on funding agreement with the concern was not practicable . . .

Id. at 60089.

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No. 06-1156

In the Supreme Court of the United States

NIGHT VISION CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
JEANNE E. DAVIDSON
KYLE CHADWICK
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioner's Small Business Innovation Research Phase I and Phase II contracts with the Department of the Air Force did not contain an implied term entitling petitioner to a Phase III contract if certain conditions were met.

2. Whether the court of appeals correctly held that an Air Force contracting officer lacked authority to form an oral or implied-in-fact contract obligating the United States to award petitioner a Phase III contract.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 10

TABLE OF AUTHORITIES

Cases:

AEC-ABLE Eng'g Co., [1994-1995] Gov't Cont. Rep. (CCH) ¶ 108,719 (Comp. Gen. Jan. 24, 1995) 4
Chris Berg, Inc. v. *United States*, 426 F.2d 314 (Ct. Cl. 1970) 7, 8
Federal Crop Ins. Corp. v. *Merrill*, 332 U.S. 380 (1947) 8
H. Landau & Co. v. *United States*, 886 F.2d 322 (Fed. Cir. 1989) 10
Harbert/Lummus Agrifuels Projects v. *United States*, 142 F.3d 1429 (Fed. Cir. 1998), cert. denied, 525 U.S. 1177 (1999) 9
LDG Timber Enters. v. *Glickman*, 114 F.3d 1140 (Fed. Cir.), cert. denied, 522 U.S. 916 (1997) 9
The Floyd Acceptances, 74 U.S. (7 Wall.) 666 (1868) 10
Utah Power & Light Co. v. *United States*, 243 U.S. 389 (1917) 8
Wisniewski v. *United States*, 353 U.S. 901 (1957) 8

Statutes and regulation: Page

Small Business Innovation Development Act of 1982, Pub. L. No. 97-219, 96 Stat. 217 (15 U.S.C. 638) ... 1, 2, 6
15 U.S.C. 638(e)(4)(A) ... 2
15 U.S.C. 638(e)(4)(B) ... 2
15 U.S.C. 638(e)(4)(C) ... 2, 3, 9
15 U.S.C. 638(e)(4)(C)(ii) ... 10
15 U.S.C. 638(f) ... 2
15 U.S.C. 638(g) ... 6
15 U.S.C. 638(j) ... 5, 8
15 U.S.C. 638(j)(2) ... 2, 6, 7
15 U.S.C. 638(j)(2)(C) ... 2, 4, 6, 7
Small Business Innovation Research Program Authorization Act of 1992, Pub. L. No. 102-564, § 103(f), 106 Stat. 4249 (15 U.S.C. 638(j)(2)) ... 2
48 C.F.R. 2.101 ... 9, 10

Miscellaneous:

58 Fed. Reg. (1993):
p. 6144 ... 2
p. 6148 ... 3
p. 6149 ... 3, 8

In the Supreme Court of the United States

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-13) is reported at 469 F.3d 1369. The opinion of the Court of Federal Claims (Pet. App. 14-78) is reported at 68 Fed. Cl. 368.

JURISDICTION

The judgment of the court of appeals was entered on November 22, 2006. The petition for a writ of certiorari was filed on February 16, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1982, Congress provided for the creation of Small Business Innovation Research (SBIR) programs, see Small Business Innovation Development Act of 1982, Pub. L. No. 97-219, 96 Stat. 217 (15 U.S.C. 638), a means

by which federal agencies must spend a portion of their research and development budgets on contracts awarded to small businesses, see 15 U.S.C. 638(f). Procuring agencies may award SBIR contracts in three "phases." Phase I contracts fund the investigation of "the scientific and technical merit and feasibility of ideas that appear to have commercial potential." 15 U.S.C. 638(e)(4)(A). Phase II contracts "further develop proposals which meet particular program needs." 15 U.S.C. 638(e)(4)(B). "[W]here appropriate," an agency can award Phase III contracts, which direct private funding and public funding not earmarked for the SBIR program to small businesses so that they can further research their ideas or develop them for commercial or public applications. 15 U.S.C. 638(e)(4)(C).

Congress amended 15 U.S.C. 638 in 1992, see Small Business Innovation Research Program Authorization Act of 1992, Pub. L. No. 102-564, § 103(f), 106 Stat. 4249, adding 15 U.S.C. 638(j)(2), which provides that the Small Business Administration (SBA) "shall modify" its "policy directives" to provide for "procedures to ensure, to the extent practicable, that an agency which intends to pursue research, development, or production of a technology developed by a small business concern under a SBIR program enters into follow-on, non-SBIR funding agreements with the small business concern for such research, development, or production." 15 U.S.C. 638(j)(2)(C). The SBA Administrator satisfied Section 638(j)(2)(C) by publishing a modified SBIR policy directive. 58 Fed. Reg. 6144 (1993). In the modified policy directive, the Administrator provided that a small business proposing a new technology must perform at least two-thirds of the research and analytical effort in a Phase I contract and at least one-half in a Phase II

contract. *Id.* at 6148. With respect to Phase III contracts, the modified policy directive states that a "federal agency *may* enter into a third phase agreement with a small business concern for additional work to be performed during or after the second phase period," and provides that a Phase II contract "*may, at the discretion of the agency awarding the agreement*, set out the procedures applicable to third phase agreements." *Id.* at 6149 (emphases added). The modified policy directive nowhere guarantees a Phase III contract. Instead, it provides, like Section 638(e)(4)(C), that the agency can enter a Phase III contract "[w]here appropriate" and that "[a]gencies which intend to pursue research, research and development or production developed under the SBIR Program will give special acquisition preference including sole source awards to the SBIR company which developed the technology." *Ibid.*

2. Petitioner conducted research and development of night vision goggles for the Department of the Air Force from 1995 until 1999. Pet. App. 19, 27. The Air Force awarded petitioner a Phase I contract in May 1995 to develop a prototype of petitioner's Panoramic Night Vision Goggles (PNVGs). *Id.* at 16, 19. In July 1996, the Air Force awarded petitioner a Phase II contract to produce twelve more prototypes. *Ibid.*

Petitioner hired Insight Technologies Corp. (Insight) to be its principal subcontractor for Phase II. Pet. App. 21. Petitioner and Insight "maintained a tenuous relationship," *ibid.*, to the point of endangering the Phase II contract, *id.* at 22. The Air Force mediated the dispute while the Air Force and petitioner discussed the possibility of a Phase III contract. *Ibid.* In June 1999, the Air Force announced that, instead of awarding peti-

tioner a Phase III contract, it was considering seeking competitive procurement. *Id.* at 24.

In December 1999, an Air Force official adopted an acquisition strategy panel recommendation that the Air Force should procure Integrated Panoramic Night Vision Goggles (IPNVGs), a technology similar to petitioner's PNVGs, through competitive bidding according to the agency's Program Research and Development Announcement process. Pet. App. 31-32; cf. *AEC-ABLE Eng'g Co.*, [1994-1995] Gov't Cont. Rep. (CCH) ¶ 108,719 (Comp. Gen. Jan. 24, 1995) (discussing the process). The acquisition strategy panel's recommendation was based in part on petitioner's "difficulty in managing the Phase II contract which is less of a management challenge than a new Phase III contract would be." Pet. App. 31 (quoting the panel recommendation).

Three firms submitted bids: petitioner, Insight, and Litton Industries, Inc. Pet. App. 33. Government evaluators rated Insight's bid highest, and Insight was awarded the IPNVG contract. *Id.* at 33-34.

3. Petitioner filed a five-count complaint against the United States in the Court of Federal Claims (CFC) alleging, *inter alia*, that the Air Force had breached petitioner's Phase I and Phase II contracts by not awarding petitioner a Phase III contract (Count Two) and that the Air Force's failure to award petitioner a Phase III contract had breached an oral or implied-in-fact contract (Count Three). Pet. App. 17.

The CFC granted the government's motions for dismissal and summary judgment in full. Pet. App. 14-77. As relevant here, the court dismissed Count Two, rejecting petitioner's argument that Section 638(j)(2)(C) entitled petitioner to a Phase III contract and that such entitlement was incorporated into petitioner's Phase I and

Phase II contracts. *Id.* at 43-44. The court granted the government summary judgment on Count Three, holding that petitioner failed to establish that the alleged oral and implied-in-fact contracts guaranteeing petitioner a Phase III contract had been made by someone with authority to bind the government. *Id.* at 52. The CFC resolved the other counts of the complaint in the government's favor as well. *Id.* at 6, 77.

4. Petitioner appealed only as to Counts Two and Three, and the court of appeals affirmed. Pet. App. 2-13. With respect to Count Two, the court of appeals agreed with the CFC that Section 638(j) creates no obligations for an agency administering a SBIR program; rather, the court held, Section 638(j) merely required the SBA Administrator to modify SBA policy directives to ensure, "to the extent practicable," the statutory objective that small businesses be awarded Phase III contracts. *Id.* at 8-9. The court accordingly rejected petitioner's contention that Section 638(j) mandates particular action (*e.g.*, awarding Phase III contracts to small businesses that complete Phase I and Phase II contracts) to achieve that objective. *Id.* at 9-10.

With respect to Count Three, the court agreed with the CFC that petitioner had no evidence that a duly authorized government official had created the alleged oral and implied-in-fact contracts. Pet. App. 11-12. Assuming that the official who allegedly promised petitioner a Phase III contract was the Air Force contracting officer, the court held that she had no contract-making authority at the time of the alleged promises because the Air Force had not then determined whether to procure night vision goggles through a Phase III contract or through competitive procurement. *Ibid.* The contracting officer,

the court noted, did not have the authority to make that preliminary decision for the Air Force. *Ibid.*

ARGUMENT

The court of appeals' determination that the Air Force was not contractually bound to award a Phase III contract to petitioner is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 20-22) that a small business is entitled to a Phase III contract under Section 638(j)(2)(C) whenever "the Government intend[s] to pursue further research, development or production of the [small business's] technology" and "a Phase III award [is] 'practicable.'" Pet. 20. Petitioner misunderstands Section 638(j)(2)(C).

Section 638(j)(2) provides that

> the [SBA] Administrator shall modify the policy directives issued pursuant to this subsection to provide for * * * (C) procedures to ensure, to the extent practicable, that an agency which intends to pursue research, development, or production of a technology developed by a small business concern under an SBIR program enters into follow-on, non-SBIR funding agreements [*i.e.*, Phase III contracts] with the small business concern for such research, development, or production.

15 U.S.C. 638(j)(2). The court of appeals correctly held (Pet. App. 10) that Section 638(j)(2)(C) creates no entitlement. Rather, the statute requires only that the SBA (and not any other agency[1]) is to modify its policy direc-

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[1] Other sections of Section 638 directly apply to other agencies, but they are not relevant here. See, *e.g.*, 15 U.S.C. 638(g) (providing that

tives. Petitioner argues (Pet. 16) that the court of appeals' reading of Section 638(j)(2)(C) gives "undue emphasis to the statute's prefatory language," and petitioner chastises (Pet. 17) the court for concluding that Section 638(j)(2)(C) "deals with 'procedures'" to accomplish the statutory objective and "*does not mandate particular action to achieve those results.*" But the so-called "prefatory language" in Section 638(j)(2) identifies both the *subject* of the statutory requirement (the SBA Administrator) and the *scope* of that requirement ("modify the [SBA's] policy directives"), so the court of appeals quite correctly interpreted the statute in a manner that gives effect to those textual limitations. Petitioner's interpretation, by contrast, would effectively read those crucial provisions out of the statute, transforming it from a limited directive to the SBA into a substantive mandate imposed directly on all federal agencies with SBIR programs. There is no warrant for that revisionist result, and in any event the court of appeals' plain-language interpretation of the statute, which involves a "question of first impression" (Pet. 15), does not merit review.

Petitioner's breach of contract theory (Pet. 24) is that the so-called entitlement in Section 638(j)(2)(C) was incorporated into petitioner's Phase I and Phase II contracts. As discussed above, the major premise of that theory is invalid. Petitioner, moreover, has failed to demonstrate how Section 638(j)(2)(C) could be deemed incorporated into the contracts. Petitioner cites (Pet. 24) *Chris Berg, Inc.* v. *United States*, 426 F.2d 314 (Ct. Cl. 1970), as a case in which a regulation was read into

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each agency with a SBIR program "shall" "unilaterally" review proposals, "unilaterally" award SBIR contracts, and "administer its own SBIR funding agreements").

a contract to bind the government. The Court of Claims in *Chris Berg*, however, actually held that a private party was allowed to reform a contract that the government had made in violation of a regulation that prohibited the government from making such contracts. *Id.* at 317-318. *Chris Berg* is inapplicable here because the government did not violate Section 638(j) by entering into petitioner's Phase II contract. Nor did the Air Force violate the SBA's modified policy directive, which affords an agency discretion to enter into Phase III contracts. See 58 Fed. Reg. at 6149. And in any event, any alleged intra-circuit conflict between the decision below and *Chris Berg* would not merit this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

2. Petitioner argues (Pet. 18) that, in affirming the dismissal of its oral and implied-in-fact contract claim, the court of appeals articulated a "new sweeping rule concerning the authority of Contracting Officers * * * in derogation of express federal regulations and long-established common law." Petitioner's reading of the decision below is unfounded.

A party alleging a breach of an express or implied government contract must establish that the federal representative who allegedly made the contract possessed statutory contracting authority. See *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 383-384 (1947); see also *id.* at 384 ("[T]his is so even where * * * the agent himself may have been unaware of the limitations upon his authority."). Accord *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409 (1917). Petitioner alleges (Pet. 17) that the Air Force contracting officer promised petitioner a Phase III contract. The court of appeals held that the contracting officer had no such

contracting authority because she lacked authority to "determin[e] the type of procurement to be used for a particular transaction." Pet. App. 11; see *id.* at 59 (collecting authorities). Although petitioner notes (Pet. 28) that contracting officers have authority to enter into contracts in appropriate circumstances, that authority is ineffective until the officer's agency, pursuant to its governing procedures, has determined the type of procurement contract it needs. See *Harbert/Lummus Agrifuels Projects* v. *United States*, 142 F.3d 1429, 1433 (Fed. Cir. 1998) ("[A]gency procedures must be followed before a binding contract can be formed."), cert. denied, 525 U.S. 1177 (1999). As the statute defines a Phase III contract, there must be special funding for the contract, see 15 U.S.C. 638(e)(4)(C), and a contracting officer does not have authority to make that funding decision unilaterally.

Petitioner relies (Pet. 28) on Section 2.101 of the Federal Acquisition Regulations (FAR), 48 C.F.R. 2.101, which states that a contracting officer can "enter into, administer, and/or terminate contracts," and upon *LDG Timber Enterprises* v. *Glickman*, 114 F.3d 1140 (Fed. Cir.), cert. denied, 522 U.S. 916 (1997), which held that a contracting officer had authority to modify a contract when the officer was "administer[ing] a contract with which the officer is charged" and "the actions of the contracting officer are within the authority that pertains to the subject matter of the contract, and no statute or regulation limits that authority," *id.* at 1143. Neither FAR 2.101 nor *LDG Timber*, however, supports the proposition that a contracting officer can commit an agency to one method of procurement when the officer's agency

has not yet committed to a method.[2] Nor does either authority support the proposition that a contracting officer can enter into oral or implied-in-fact contracts to procure new technology. Indeed, as the trial court noted (Pet. App. 60), FAR 2.101 expressly requires that procurement contracts must be "in writing" "except as otherwise authorized," and there is no indication in the record that the contracting officer was "otherwise authorized" to make an oral contract. Accordingly, further review is not warranted.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

JEANNE E. DAVIDSON
KYLE CHADWICK
Attorneys

APRIL 2007

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[2] Both the statute (*e.g.*, 15 U.S.C. 638(e)(4)(C)(ii)) and Air Force regulations (see Pet. App. 31-32) provide procedures for selecting a method of procurement.

[3] Assuming, *arguendo*, that authority to form government contracts may arise by implication, rather than from an express legislative grant, compare *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666, 679 (1869) (stating "written law" is "the exclusive source" of authority to obligate government funds), with *H. Landau & Co.* v. *United States*, 886 F.2d 322, 324 (Fed. Cir. 1989) (discussing "implied actual authority"), petitioner still could not overcome the prohibition against oral contracts in FAR 2.101.

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No. 06-1156

In the Supreme Court of the United States

NIGHT VISION CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY TO BRIEF IN OPPOSITION

JAMES S. DELSORDO
ARGUS LEGAL, LLC
9255 Center Street
Suite 307
Manassas, Virginia 20110
(703) 368-8770

STEPHEN NOVACK
Counsel of Record
P. ANDREW FLEMING
JOHN F. SHONKWILER
NOVACK AND MACEY LLP
100 North Riverside Plaza
Chicago, Illinois 60606
(312) 419-6900

Attorneys for Petitioner

Midwest Law Printing Company/Photex — Chicago — (312) 431-0185

TABLE OF CONTENTS

PAGE

ARGUMENT 1

I. The Opposition Brief's Argument Regarding Count II 2

A. The Government Waived Any Argument That Relevant Laws Are Not Incorporated Into Contracts 2

B. The Government's Arguments Reinforce The Importance Of This Case 3

II. The Opposition Brief's Arguments Regarding Count III 4

A. The Air Force's Oral Promise 4

B. The Government's Inaccurate Characterization 5

C. When Count III Is Properly Understood, The Flaws In The Government's And Federal Circuit's Reasoning Are Apparent 6

D. FAR 2.101 Does Not Prohibit Oral Contracts 8

CONCLUSION 9

TABLE OF AUTHORITIES

Cases **PAGE(S)**

Brunner v. U.S.,
No. 98-554C, 2006 WL 1189492
(Ct. Cl. May 2, 2006) 9

Harbert/Lummus Agrifuels Projects v. U.S.,
142 F.3d 1429 (Fed. Cir. 1998) 7

H. Landau & Co. v. U.S.,
886 F.2d 322 (Fed. Cir. 1989) 8

Pacord v. U.S.,
139 F.2d 1320 (9th Cir. 1998) 8

U.S. v. Ford Motor Co.,
463 F.3d 1267 (Fed. Cir. 2006) 2

Statutes and Rules

67 FR 60067 ..... 5, 6

ARGUMENT[1]

If it stands, the Federal Circuit's decision will reshape the law on two issues in a way that will have broad, lasting and harmful implications for the Government and government contractors. Critically, the Circuit's decision threatens to defeat Congressional intent by nullifying a system of incentives and protections that were put in place to remedy Government discrimination against small business contractors, and to promote innovation. Because the legal issues at stake are uniquely within the Federal Circuit's jurisdiction, unless this Court intervenes the Federal Circuit will almost certainly have the last (and only) word on these issues. The issues are thus ripe and worthy of review by this Court.

In the Petition, NVC identified and discussed the various reasons why this case is important and worthy of review. It is revealing that the Government does not challenge these reasons, except to make the obvious point that the Federal Circuit's ruling "does not conflict with any ruling from this Court or other court of appeals." (Brief in Opposition ("Opposition Brief") 6.) Of course, this *must* be true because, as explained in the Petition (Pet. 15, 17-18), the Circuit's ruling is the first—and likely the last—word on both issues.

Instead, the Opposition Brief focuses almost exclusively on the merits of the rulings below. The reason for this Reply is that, in its discussion of the merits, the Opposition Brief raises new arguments as to some issues, and creates confusion as to others.

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[1] Defined terms and abbreviations used in this Reply have the same meaning ascribed to them in the Petition for Writ of Certiorari (the "Petition").

I. The Opposition Brief's Arguments Regarding Count II

The Opposition Brief's discussion of Count II is noteworthy for two reasons: *first*, the Government tries to raise an issue that it waived by not arguing it on appeal; and *second*, its arguments actually *reinforce* why this case is so important and appropriate for review by this Court.

A. The Government Waived Any Argument That Relevant Laws Are Not Incorporated Into Contracts

NVC's written contract claim in Count II alleges that §638—in particular, its mandate regarding Phase III contract awards—was incorporated by law into the SBIR Phase II contract. (Am. Compl. ¶¶89-98.) NVC maintains that this is so because of the fundamental legal principle that "[t]he law in effect when a government contract is made becomes a part of the contract." (*See* Pet. App. 7, 50, n.18.) Neither court below questioned this underlying legal principle. (*Id.*) On the contrary, the Court of Federal Claims recognized that this principle is "beyond doubt." (Pet. App. 50, n. 18.) And the Government itself conceded the point in the Federal Circuit. (*See* April 24, 2006 Brief For Defendant-Appellee, p. 4 ("the principle that a contract will be read as incorporating relevant statutes and regulations" is "undisputed").) Nevertheless, the Opposition Brief now argues that NVC "has failed to demonstrate" that §638 (irrespective of what it means or requires of the Government) "could be deemed incorporated into the contracts." (Opp. Br. 7-8.) Because it conceded the point on appeal, the Government waived it, *U.S. v. Ford Motor Co.*, 463 F.3d 1267, 1276-77 (Fed. Cir. 2006), and this Court should disregard it.

B. The Government's Arguments Reinforce The Importance Of This Case

The Federal Circuit affirmed the dismissal of Count II because it found that §638 imposes *no duty* on the Government and creates *no rights* for private entities. As NVC explained in its Petition, if this ruling is allowed to stand, SBIR contractors and small business will lose the essential protections and incentives that Congress intended to confer through SBIR, and the Government will lose the ability to attract innovative technology from small businesses. (Pet. 15, 18-19.)

The Opposition Brief confirms that NVC's gloomy predictions are well founded, and that the Federal Circuit's ruling below is every bit as broad as NVC described it in the Petition. In particular, the Government states:

> The court of appeals correctly held that Section 638(j)(2)(C) creates no entitlement. Rather, the statute requires only that the SBA (and not any other agency) is to modify its policy directives.

(Opp. Br. 6-7; citation and footnote omitted.) Likewise, the Government endorses what it calls the Federal Circuit's "plain-language interpretation" that §638 "deals with 'procedures' to accomplish the statutory objective" and "does not mandate particular action to achieve those results." (*Id.* 7.)

In short, notwithstanding the parties' many disputes regarding the *merits* of the case, there is *no* dispute as to the scope of the Circuit's ruling below. If the ruling stands, §638(j)(2)(C)—one of the principal protections in the SBIR Laws—will be gutted. Agencies will, once again, have unfettered discretion to deny SBIR Developers the financial reward for the Government's use of their innovations—*i.e.*, the Phase III contracts. And SBIR's objective—to correct the inclination of the executive branch,

when left unchecked, to make procurement decisions that discriminate against small business and inhibit innovation—will have been defeated. (Pet. 4-5, 19.) This Court should reject the Circuit's attempt to render §638(j)(2)(C) meaningless. If it does not do so—and allows the Circuit's decision to stand—the Government will have the very discretion that Congress attempted to take away.

II. The Opposition Brief's Arguments Regarding Count III

It is somewhat surprising that, after admitting that the SBIR Policy Directive requires agencies to "give special acquisition preference" to SBIR Developers (Opp. Br. 3), the Government turns around and argues that the Air Force's oral promise to NVC—which did exactly that—was *unauthorized*. (*Id.* 8-10.) At the very least, SBIR laws surely *authorize* Contracting Officers to make the kind of commitment NVC alleges in Count III, even if (as the Circuit held in dismissing Count II) they do not *mandate* it. (*See* Pet. App. 10).

In its attempt to support the Federal Circuit's dismissal of Count III, the Government makes various erroneous and misleading characterizations of the Air Force's promise to NVC that is the basis of Count III. Because the sole ground for the Federal Circuit's disposition of Count III was the Circuit's finding that the Air Force Contracting Officer lacked authority to make the alleged promise, the erroneous descriptions of the alleged promise are critical and must be corrected.

A. The Air Force's Oral Promise

The Air Force promised NVC that *if*—but only if—Phase II succeeded *and* the Air Force decided to pursue the

PNVG technology, the ensuing (*i.e.*, Phase III) contract would go to NVC. (Pet. 9-10, 27.) The fact that the contract the Air Force (conditionally) promised to NVC would be a "Phase III" contract is not merely NVC's factual allegation, but the necessary legal consequence of any decision by the Government to pursue Phase II's PNVG technology. (*E.g.*, Pet. 6, citing 67 FR 60072, 60085.) According to the SBIR Policy Directive, which is binding on agencies, "work that derives from, extends, or logically concludes effort(s) performed under prior SBIR funding agreements, but is funded by sources other than the SBIR Program" is, by definition, "Phase III." (*Id.*) This is a point of law that the Government occasionally ignores, but has never disputed. Thus, the actionable promise alleged in Count III is neither: (a) an oral Phase III contract; nor (b) an unconditional promise that the Air Force would award a Phase III contract at all.

B. The Government's Inaccurate Characterization

The Government does not appreciate—or simply has ignored—the foregoing distinction. The Opposition Brief describes the second "Question Presented" as follows:

> Whether the court of appeals correctly held that an Air Force contracting officer lacked authority to form an oral or implied-in-fact contract obligating the United States to award petitioner a Phase III contract.

(Opp. Br. (I); *see also id.* 8 ("Petitioner alleges that the Air Force contracting officer promised petitioner a Phase III contract").) Yet, the issue is not that simple. The Government's statement of the issue fails to acknowledge that the promise was *conditional*, and it did not obligate the Air Force to proceed to Phase III—*i.e.*, the Air Force promised only that *if* it decided to pursue the PNVG beyond Phase II, the Phase III contract would go to NVC.

C. When Count III Is Properly Understood, The Flaws In The Government's And Federal Circuit's Reasoning Are Apparent

The Federal Circuit disposed of Count III for one reason: it (erroneously) held that the authority of a Contracting Officer "does not include determining the type of procurement to be used for a particular transaction." (Pet. App. 11.) As explained in the Petition, this ruling is unsupported by *any* legal authority, and it contradicts the established rule that implied authority exists where: (i) the alleged promise is "within the scope of the subject matter" of the Contracting Officer's assignment, and (ii) no published law restricts the Contracting Officer's authority to make such a promise. (Pet. 27-30.) These points are adequately covered in the Petition, and will not be repeated here.

However, the point that is important here—and the point that seems to be lost on the Government—is that the Circuit's ruling is *factually* unsupported as well. The Circuit's factual error is somewhat obscured in the Opposition Brief by the Government's mischaracterization of NVC's underlying claim. When the claim is properly understood, the flaws in the Government's—and Circuit's—reasoning are apparent.

Contrary to the Circuit's ruling, the Air Force's promise to NVC did not "determine the type of procurement to be used." The SBIR Laws, themselves, did so by providing that *any* contract that "derives from, extends or logically concludes" work performed in Phase II *is* a "Phase III" contract. 67 FR 60067, 60085. NVC was not promised that there would be a Phase III; it was promised that *if* the Air Force decided to pursue the PNVG technology (a matter wholly within the Air Force's discretion), the contract (*i.e.*, Phase III) would go to NVC on a *sole source*

basis. (Am. Compl. ¶101).[2]

The Government's attempt to prop up the Federal Circuit's unsupported ruling fails. The Opposition Brief (at 9) cites two authorities—the Court of Federal Claims opinion below (Pet. App. 59), and *Harbert/Lummus Agrifuels Projects v. U.S.*, 142 F.3d 1429 (Fed. Cir. 1998)—neither of which supports the Government's arguments. The Court of Federal Claims opinion discusses procedural prerequisites for a *Phase III contract*. (*See* Pet. App. 59-60 (identifying solicitations, proposals and written documents as procedural prerequisites for *Phase III* contracts).) This has no bearing on Count III because NVC does not allege that it had an oral Phase III contract. Indeed, the oral/implied contract arose long before the Air Force had even decided whether to pursue Phase III. In fact, it would only be *after* the Air Force decided to pursue Phase II's technology (and, thus, to proceed to Phase III) that the Phase III agency procedures would come into play. And, by then, pursuant to the oral/implied contract, the only party that could have received the Phase III contract was NVC.

The *Harbert/Lummus* case is inapposite. First of all, it does *not* hold that Contracting Officers lack authority to determine the "form" or "type" of a procurement. Further, that case concerned an alleged oral promise from a contracting officer whose official delegation of contracting authority provided that he *lacked authority to make oral*

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[2] The Government admits that the "IPNVG" technology that the Air Force pursued after Phase II was "similar to petitioner's PNVGs." (Opp. Br. 4.) Thus, the IPNVG contract "derived from" work performed in Phase II, and *was* "Phase III." The Government breached its oral/implied contract with NVC by purporting to "compete" the contract instead of awarding it to NVC on a sole source basis.

contracts. 142 F.3d at 1432. There is no such evidence in the record here.

The Government also argues that "there must be special funding" for a Phase III contract, and "a contracting officer does not have authority to make that funding decision unilaterally." (Opp. Br. 9, citing 15 USC §638(e)(4)(C)). Again, this is irrelevant. The availability of funding goes to the question of *whether* there would be a Phase III—not *who* would receive the contract. The actionable promise alleged in Count III did not include a promise that there *would be* a Phase III.

D. FAR 2.101 Does Not Prohibit Oral Contracts

In a last ditch effort to explain how it could be that a Contracting Officer could lack authority to make contracts, the Government resurrects a point that it unsuccessfully argued to the Federal Circuit. It argues that Federal Acquisition Regulation ("FAR") Section 2.101 prohibits *all* oral contracts and, therefore, the ruling below should stand even if the reasoning was erroneous. (Opp. Br. 10.) The argument fails for several reasons, all of which are set out in greater detail in NVC's briefs filed in the Federal Circuit.[3] In summary: (1) several cases, including at least one in the Federal Circuit, recognize that the Government can be bound by oral contracts, *e.g., H. Landau & Co. v. U.S.*, 886 F.2d 322, 324 (Fed. Cir. 1989); (2) the Ninth Circuit has squarely rejected the argument that FAR 2.101 bars oral contracts, *Pacord v. U.S.*, 139 F.2d 1320, 1323 (9th Cir. 1998); (3) FAR 2.101 does not purport to prohibit or regulate *anything*, it merely defines various terms; and

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[3] *See* March 13, 2006 Appellate Brief of Night Vision Corp., pp. 55-59, and June 2, 2006 Reply Brief of Night Vision Corp. pp 27-29, both filed in the Federal Circuit.

(4) a Contracting Officer's authority to contract can be limited only through a published law or other means that places contractors on notice, *see Brunner v. U.S.*, No. 98-554C, 2006 WL 1189492, *12, 23 (Ct. Cl. May 2, 2006), but nothing in FAR 2.101, or any other law or fact in the record, provided NVC with notice that the Air Force Contracting Officer for the PNVG program lacked authority to make the contract alleged in Count III.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Petition, the Court should grant the Petition and ultimately reverse the decision of the Federal Circuit.

Respectfully submitted,

STEPHEN NOVACK
Counsel of Record
P. ANDREW FLEMING
JOHN F. SHONKWILER
NOVACK AND MACEY LLP
100 North Riverside Plaza
Chicago, Illinois 60606
(312) 419-6900

JAMES S. DELSORDO
ARGUS LEGAL, LLC
9255 Center Street
Suite 307
Manassas, Virginia 20110
(703) 368-8770

Counsel for Petitioner